TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1118.

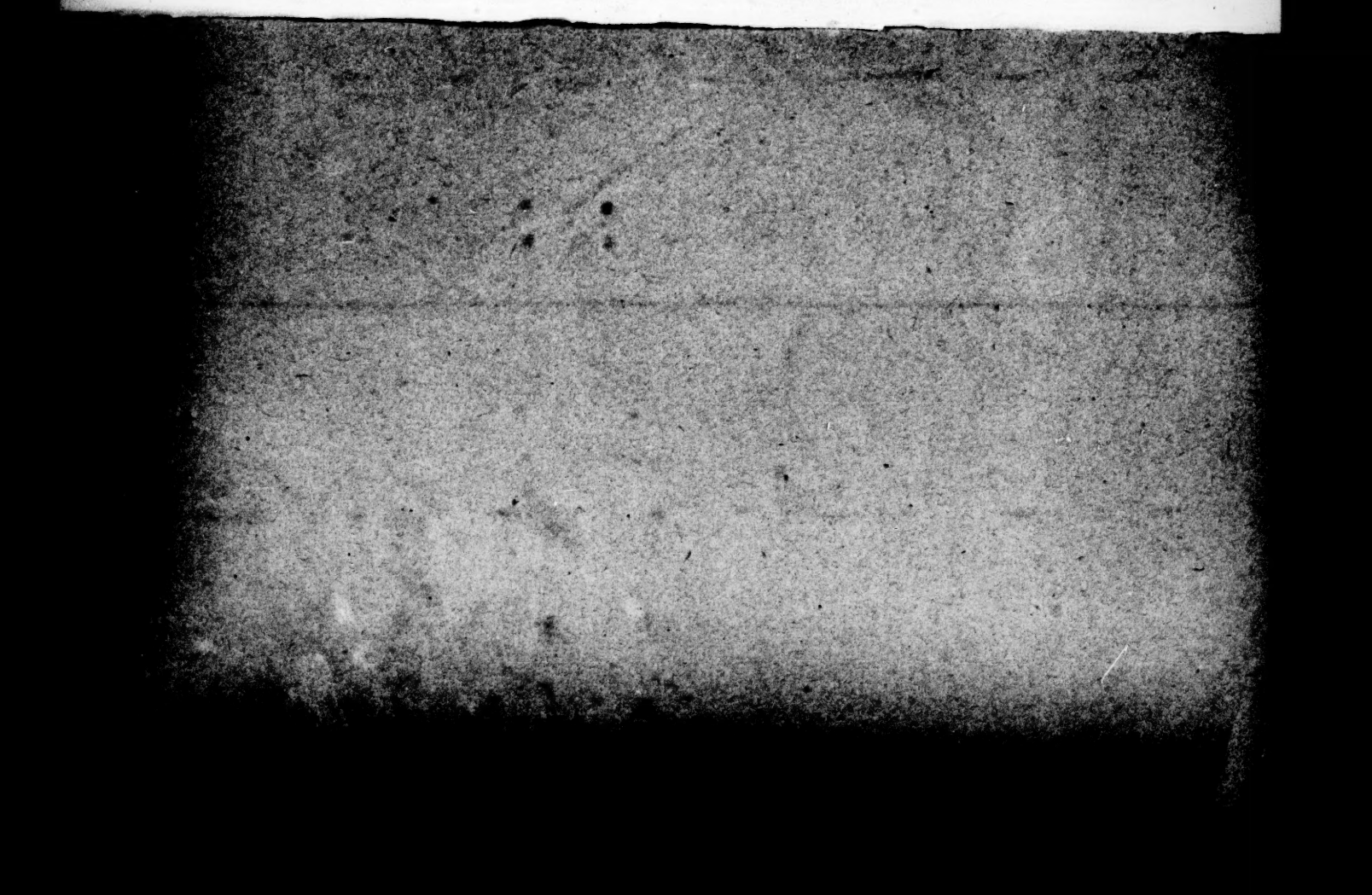
THE STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS, PLAINTIFF IN ERROR,

vs.

JOHN L. DODGE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 6, 1887.



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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 13, 1887.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the southern district of Illinois, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois before you, between John L. Dodge, plaintiff, and the State National Bank of Springfield, Illinois, defendant, a manifest error hath happened, to the great damage of the said defendant, The State National Bank of Springfield, Illinois, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you
2 may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

{ The Seal of the Circuit Court of the United States for the South'n Dist., Ill. }

JAMES T. JONES, *Clerk.*

Filed September 8th, 1887.

JAMES T. JONES, *Clerk.*

3 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Honorable John M. Harlan, one of the associate justices of the Supreme Court of the United States, presiding judge, and the Honorable Walter Q. Gresham, judge of the seventh judicial circuit, on Saturday, the sixteenth day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

JAMES T. JONES, *Clerk.*

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

JOHN L. DODGE
vs.
STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS.

Assumpsit.

John L. Dodge, a citizen of the State of Massachusetts, puts in his place Messrs. Hunt and Dyas, his attorneys, against the
4 State National Bank of Springfield, Illinois, in a plea of trespass on the case upon promises.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty-one, came said plaintiff, by his said attorneys, and filed in the clerk's office of said court his bond for costs herein, which is as follows, to wit:

Bond for Costs.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court United States of America. January Term, A. D. 1882.

JOHN L. DODGE
v.
THE STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS.

In assumpsit.

We do hereby enter ourselves security for costs in this cause and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 30 day of November, 1881.

HUNT & DYAS.

(Indorsed:) Filed November 30, A. D. 1881. J. A. Jones, clerk.

5 And afterwards, to wit, on said thirtieth day of November, in the year last aforesaid, a summons was issued in said case, directed and delivered to the marshal of said district to execute, which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court of the United States of America.

The United States of America to the marshal of the southern district of Illinois, Greeting:

We command you to summon the State National Bank of Springfield, Illinois, if found in your district, to be and appear before

our judges of our circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto John L. Dodge of a plea of assumpsit to his damage, as he alleges, of three thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield
6 aforesaid, this thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the one hundred and sixth year.

[L. S.] J. A. JONES, *Clerk.*

Executed this writ, as I am herein commanded, by reading the same and by delivering a true copy thereof to S. H. Jones, president of the State National Bank of Springfield, Ill., this 1st day of December, A. D. 1881.

JACOB WHEELER,
U. S. Marshal.

(Indorsed:) Filed December 3rd, A. D. 1881. J. A. Jones, clerk.

Then afterwards, to wit, on the twenty-third day of December, in the year last aforesaid, came again said plaintiff, by his attorneys, and filed in the clerk's office of said court his declaration and copy of orders sued on, which are in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

In the United States Circuit Court. January Term, A. D. 1882.

7 In this action the plaintiff, John L. Dodge, a non-resident of the State of Illinois and a citizen of the State of Massachusetts, by Hunt & Dyas, his attorneys, complains of the defendant, The State National Bank of Springfield, Illinois, whose principal office and place of business is at the city of Springfield, in the State of Illinois, and within the southern district of Illinois, of a plea of trespass on the case on promises—

For that, whereas, heretofore to wit, on the first day of July, A. D. 1879, at the district aforesaid, and at divers other days and times between said day and the first day of March, A. D. 1881, the United States district court for the southern district of Illinois, by its clerk, George P. Bowen, and M. B. Converse, likewise clerk and successor in office of the said George P. Bowen, deposited and placed with the defendant many large sums of money, amounting, in the aggregate, to the sum of forty thousand dollars, which said sums of money were derived from the estate of the firm of H. Sandford & Co., composed of Hiram Sanford, John C. Short, Abraham Sandusky, An-

drew Grundy, Joseph Bailey, Elwood R. Ankrom, Detrich C.
8 Smith, Herman W. Hippen, Ira W. Lake, Jacob A. Parker, Abner P. Woodworth, and Ethelbert Callahan, and from the respective separate individual estates of the said several members of said firm, which said firm and the said several individuals composing the same had before that time been duly declared and adjudged bankrupts by the said district court, and which said moneys derived from and belonging to the estates of said bankrupts had been paid into said court by James A. Eads, the assignee in bankruptcy of the said firm and the said several individuals aforesaid, and which said moneys the said court then and there held in trust for the benefit of the creditors of the said firm and the said individual members thereof, bankrupts as aforesaid, of all which facts the defendant then and there had notice; and the said defendant, having full notice of the facts aforesaid, to wit, on the days aforesaid, at the district aforesaid, then and there accepted and received the moneys aforesaid from the court aforesaid by the clerks as aforesaid, and then and there promised to faithfully keep and well and truly pay out the
9 amount of the said moneys to the persons entitled thereto, or to any part thereof, as creditors of said bankrupts, or their legal representatives, when orders for the payment of said moneys or any part thereof should be presented to defendant and payment thereof requested; and plaintiff avers that at the time of the adjudication in bankruptcy aforesaid the said firm of H. Sanford & Co. and the several individual members thereof as aforesaid were indebted to plaintiff in a large sum of money, to wit, in the sum of fifty thousand dollars, then long since due and owing by said bankrupts to the plaintiff, which said indebtedness was by plaintiff duly proved against said bankrupt estates in accordance with the provisions of the bankrupt law and by the said court duly allowed in favor of plaintiff; and that afterwards, to wit, on the 30th day of April, 1881, a dividend was by said court duly declared on the estates of said bankrupts in favor of the creditors thereof, and upon and by the said dividend there was adjudged, awarded, and allowed to
10 the plaintiff on his claim of twenty-two thousand eight hundred and seventy-four dollars and ninety-eight cents against the firm of H. Sanford & Co. the sum of one hundred and sixty dollars and twelve cents; and on his claim of twenty thousand six hundred and ninety-three dollars and thirty-three cents against the said firm of H. Sanford & Co. the sum of one hundred and forty-four dollars and eighty-five cents; and on his claim for twenty thousand six hundred and ninety-three dollars and thirty-three cents against the estate of Andrew Gundy the sum of five hundred and seventeen dollars and thirty-three cents; and on his claim of twenty-two thousand eight hundred and seventy-four dollars and ninety-eight cents against the estate of the said Joseph Bailey the sum of seventy-five dollars and forty-eight cents; and on his claim for twenty thousand six hundred and ninety-three dollars and thirty-three cents against the estate of the said Joseph Bailey the sum of sixty-eight dollars and twenty-nine cents; and on his claim for twenty thousand six hundred and ninety-

three dollars and thirty-three cents against the estate
11 of the said Abner P. Woodworth the sum of seven hundred and twenty-four dollars and twenty-six cents; and afterwards, to wit, on the 12th day of May, 1881, the said court, by M. B. Converse, its clerk, drew its six several orders for the payment, respectively, of the said several sums of money above set forth, adjudged and awarded to plaintiff on his claims as aforesaid, all of said orders bearing date on the said 12th day of May, 1881, signed by M. B. Converse, clerk of said court, and countersigned by S. H. Treat, judge of said court, and all made payable out of the funds deposited with defendant as aforesaid, and directing defendant to pay the sums of money in each of said orders specified to the order of George Hunt, attorney for John L. Dodge, and then and there, to wit, on the day last aforesaid delivered said orders to the said George Hunt; and the said George Hunt, attorney for John L. Dodge, then and there, for value received, assigned said orders and each of them to plaintiff and delivered them to plaintiff; by means whereof
12 and of the premises hereinbefore set forth the defendant then and there became liable to pay to the plaintiff the said several sums of money in the said several orders respectively mentioned, according to the tenor and effect of the said orders and each of them, when said orders, or either of them, should be presented for payment and payment thereof demanded; and being so liable the defendant then and there, in consideration thereof, promised the plaintff to pay him the said several sums of money in the said several orders mentioned and specified when the same should be presented and payment thereof demanded; and plaintiff avers that afterwards, to wit, on the 27th day of June, 1881, during the business hours of said day, to wit, between the hours of 9 o'clock a. m. and four o'clock p. m. of said day, he duly presented the said several orders, and each of them, for payment at the business office of defendant, in the city of Springfield aforesaid, and demanded payment thereon, which was by defendant then and there refused, and the said orders, and each of them, were thereupon then and there duly protested; of all of which defendant had notice.

13 And for that whereas heretofore, to wit, at the district aforesaid, to wit, on the days aforesaid, the defendant was an United States depository, and as such was designated by the United States district court for the district aforesaid for the deposit and safe keeping of funds belonging to estate in bankruptcy in said court; and plaintiff avers that on the first day of July, 1879, and on divers days and times between said day and the first day of March, 1881, the said court, by George P. Bowen, its clerk, and M. B. Converse, likewise clerk and successor in office of the said Bowen, deposited and placed with defendant as such depository large sums of money, amounting in the aggregate to the sum of forty thousand dollars, belonging to the estate of the firm of H. Sandford & Co., composed of Hiram Sanford, John C. Short, Abraham Sandusky, Andrew Gundy, Joseph Bailey, Edward R. Ankrom, Detrich C. Smith, Herman W. Hippen, Ira W. Lake, Jacob A. Parker, Abner P. Woodworth, and Ethelbert Callahan, and to the separate individual estates

of the several individuals as aforesaid composing said firm,
14 which said firm and the said several individuals composing the same had before that time been duly adjudged and declared bankrupts by said court, which said funds and moneys it was the duty of the defendant then and there to receive and safely keep and well and truly pay out to the persons entitled thereto as creditors of said bankrupts on orders drawn on such fund, signed by the clerk and countersigned by the judge of said court; and the defendant, well knowing the facts aforesaid and the premises and its duty thereunder, then and there, to wit, on the days aforesaid, received and accepted the said several sums of money and promised to safely keep and pay the same out to the persons entitled thereto on orders as aforesaid; and plaintiff avers that he was a creditor of said bankrupts, they being indebted to him at the time of and before their adjudication in bankruptcy in a large sum of money, to wit, in the sum of fifty thousand dollars, which indebtedness had been duly proved against said bankrupt estates and allowed by said court in favor of plaintiff; and afterwards,
15 to wit, on the 30th day of April, 1881, a dividend was duly declared by said court of and from the said bankrupt estates in favor of the creditors thereof, and at the making of said dividends there was awarded and adjudged to plaintiff on his claim for twenty-two thousand eight hundred and seventy-four dollars and ninety-eight cents against the said firm of Hanford & Co., bankrupts, the sum of one hundred and sixty dollars and twelve cents, and on his claim for twenty thousand six hundred and ninety-three dollars and thirty-three cents against the estate of the said firm of H. Sanford & Co., bankrupts, the sum of one hundred and forty-four dol-dollars and eighty-five cents, and on his claim for twenty thousand six hundred and ninety-three dollars and thirty-three cents against the said Andrew Gundy, bankrupt, the sum of five hundred and seventeen dollars and thirty-three cents, and on his claim for twenty-two thousand eight hundred and seventy-four dollars and ninety-eight cents against the estate of the said Joseph Bailey,
16 bankrupt, the sum of seventy-five dollars and forty-eight cents, and on his claim for twenty thousand six hundred and ninety-three dollars and thirty-three cents against the estate of the said Joseph Bailey, bankrupt, the sum of sixty-eight dollars and twenty-nine cents, and on his claim for twenty thousand six hundred and ninety three dollars and thirty-three cents against the estate of the said Abner P. Woodworth, bankrupt, the sum of seven hundred and twenty-four dollars and twenty-six cents; and afterwards, to wit, on the 12th day of May, 1881, the said court, by M. B. Converse, its clerk, drew its six several orders for the payment, respectively, of the said several sums of money above set forth, awarded and adjudged to plaintiff on his claims as aforesaid, all of said orders bearing date on the said 12th day of May, 1881, signed by M. B. Converse, clerk of said court, and countersigned by S. H. Treat, judge of said court, and all made payable out of the moneys deposited with defendant as aforesaid and directing

defendant to pay the sum of money in each of said
17 orders specified to the order of George Hunt, attorney for
John L. Dodge, and there, to wit, on the day last aforesaid, delivered said orders to the said George Hunt, and the said George Hunt, attorney for John L. Dodge, then and there, for value received, assigned said orders and each of them and delivered the same to the plaintiff, by means whereof and of the premises hereinbefore set forth, the defendant then and there became liable to pay to the plaintiff the said several sums of money in the said several orders respectively mentioned and specified according to the tenor and effect of the said orders and each of them when said orders or either of them should be presented for payment and payment thereof demanded, and being so liable, the defendant afterwards, to wit, on the day last aforesaid, then and there, in consideration thereof, promised the plaintiff to pay him the said several sums of money in the said several orders mentioned and specified when the same should
be presented and payment thereof demanded; and plaintiff
18 avers that afterwards, to wit, on the 27th day of June, 1881,
he duly presented the said several orders to defendant and — payment—this at the business office of defendant, in the city of Springfield as aforesaid—and thereupon payment of said orders and each of them and the sums of money therein was by defendant then and there refused.

And for that whereas the said defendant heretofore, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and eighty-one, at the southern district of Illinois, to wit, at the county aforesaid, became and was indebted to the said plaintiff in the sum of two thousand dollars of lawful money of the United States of America for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant, and being so indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the same day and
year, and at the place aforesaid, undertook and then and
19 there faithfully promised the said plaintiff well and truly to
pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth, when the said defendant should be thereunto afterwards requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof were reasonably worth the further sum of

two thousand dollars of like lawful money as aforesaid, to wit,
20 at the place aforesaid, whereof the said defendant afterwards,
on the same day and year, and at the placeaforesaid, had notice
And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of two thousand dollars of like lawful money as aforesaid for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant, and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant, and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff, and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money owing from said defendant to said plaintiff, and in the like sum for the price and value of work then
21 done and material for the same provided by the said plaintiff for the said defendant, and at the like special request of the said defendant, and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in the said several counts herein mentioned when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of two thousand dollars of like lawful money as aforesaid; and, being so indebted and so found in arrear to the said plaintiff, the
22 said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested. Nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money in the said several counts above mentioned or any or either of them or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiff of three thousand dollars, and therefore the said plaintiff brings suit, etc.

HUNT & DYAS,
Plaintiff's Attorneys.

(Indorsed:) Filed December 23, 1881. J. A. Jones, clerk.

23 *Copy Account Sued on.*

The State National Bank of Springfield, Illinois, to John L. Dodge, Dr.

To good-, wares, and merchandise sold and delivered	$2,000 00
To money lent and advanced	2,000 00
To money paid, laid out, and expended	2,000 00
To money had and received to and for the use of said plaintiff	2,000 00
To money due for interest and forbearance	2,000 00
To labor, services, and material	2,000 00
To balance due on account stated	2,000 00

(Endorsed:) Filed December 23, 1881. J. A. Jones, clerk.

24 Check No. 27. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of H. SANFORD & Co., Bankrupt.

SPRINGFIELD, ILLS., *May 12th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, one hundred and sixty & $\frac{12}{100}$ dollars, being in full for the dividend of $\frac{7}{10}$ per cent. declared April 30th, 1881, on his claim for $22,874.98 proven against said bankrupt's estate.

$160.12. 15428. M. B. CONVERSE, *Clerk.*

Countersigned:
S. H. TREAT, *Judge,*
Per J. F. C.

[Written across the face in red ink.]

Protested for non-payment June 27, 1881.

JAS. F. McNEIL,
Notary Public.

Pay to the order of John L. Dodge.

GEO. HUNT,
Att'y for John L. Dodge.

Check No. 28. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of H. SANFORD & Co., Bankrupt.

SPRINGFIELD, ILLS., *May 12th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, one hundred and forty-four & $\frac{88}{100}$ dollars, being in full for the dividend

of $\frac{7}{100}$ per cent. declared April 30, 1881, on his claim for $20,693.33 proven against said bankrupt's estate.

$144.85. 15429. M. B. CONVERSE, *Clerk.*

Countersigned:
S. H. TREAT, *Judge,*
Per J. F. C.

[Written across the face in red ink.]

Protested for non-payment June 27, 1881.
JAS. F. McNEIL,
Notary Public.

Pay to the order of John L. Dodge.
GEO. HUNT,
Att'y for John L. Dodge.

Check No. 2. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of JOSEPH BAILEY, Bankrupt.

SPRINGFIELD, ILLS., *May 12th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, seventy-five & $\frac{48}{100}$ dollars, being in full for the dividend of $\frac{33}{100}$ per cent. declared April 30, 1881, on his claim for $22,874.98 proven against said bankrupt's estate.

$75.48 15492. M. B. CONVERSE, *Clerk.*

Countersigned:
S. H. TREAT, *Judge,*
Per J. F. C.

[Written across the face in red ink.]

Protested for non-payment June 27, 1881.
JAS. F. McNEIL,
Notary Public.

Pay to the order of John L. Dodge.
GEO. HUNT,
Att'y for John L. Dodge.

25 Check No. 3. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of JOSEPH BAILEY, Bankrupt.

SPRINGFIELD, ILLS., *May 12th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, sixty-eight & $\frac{29}{100}$ dollars, being in full for the dividend of $\frac{33}{100}$ per cent. de

clared April 30th, 1881, on his claim for $20,693.33 proven against said bankrupt's estate.

$68.29. 15493. M. B. CONVERS, *Clerk.*

Countersigned:
S. H. TREAT, *Judge,*
Per J. F. C.

[Written across the face in red ink.]

Protested for non-payment June 27, 1881.

JAS. F. McNEIL,
Notary Public.

Pay to the order of John L. Dodge.

GEO. HUNT,
Att'y for John L. Dodge.

Check No. 2. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of ANDREW GUNDY, Bankrupt.

SPRINGFIELD, ILLS., *May* 12, 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, five hundred and seventeen & $\frac{33}{100}$ dollars, being in full for the dividend of 2½ per cent. declared April 30th, 1881, on his claim for $20,693.33 proven against said bankrupt's estate.

$517.33. 15502. M. B. CONVERSE, *Clerk.*

Countersigned:
S. H. TREAT, *Judge,*
Per J. F. C.

[Written across the face in red ink.]

Protested for non-payment June 27, 1881.

JAS. F. McNEIL,
Notary Public.

Pay to the order of John L. Dodge.

GEO. HUNT,
Att'y for John L. Dodge.

Check No. 3. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of ABNER P. WOODWORTH, Bankrupt.

SPRINGFIELD, ILLS., *May* 12, 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, seven hundred and twenty-four & $\frac{36}{100}$ dollars, being in full for the divi-

dend of 3½ per cent. declared April 30, 1881, on his claim for $20,693.33 proven against said bankrupt's estate.

$724.26. 15506. M. B. CONVERSE, *Clerk.*

Countersigned:

S. H. TREAT, *Judge,*

Per J. F. C.

[Written across the face in red ink.]

Protested for non-payment June 27, 1881.

JAS. F. McNEIL,
Notary Public.

Pay to the order of John L. Dodge.

GEO. HUNT,
Att'y for John L. Dodge.

(Indorsed:) Filed December 23, 1881. J. A. Jones, clerk.

26 Afterwards, to wit, on the third day of January, in the year of our Lord one thousand eight hundred and eighty-two, came the defendant, by Milton Hay, Esq., its attorney, and filed in the clerk's office of said court its plea herein, which said plea is in the words and figures following, to wit:

Plea.

STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS,
ads.
JOHN L. DODGE, Assignee, &c.

The said defendant, by its attorney, comes and defends the wrong and injury when, &c. It says it did not undertake and promise as the said plaintiff in his declaration has alleged, and of this puts itself upon the country.

HAY, *For Def't.*

And the plaintiff doth the like.

GEO. HUNT, *His Att'y.*

(Indorsed:) Filed January 3rd, 1882. J. A. Jones, clerk.

Then afterwards, to wit, on the twentieth day of June, in
27 the June term of said court, in the year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

1st Trial. Judgment & Motion for New Trial.

JOHN L. DODGE *v.* STATE NATIONAL BANK.

Assumpsit.

This day comes as well the plaintiff, by Messrs. Hunt and Dyas, his attorneys, as the defendant, by Messrs. M. Hay and James A. Connolly, its attorneys, and the issue joined by consent is tried by

the court, a jury being waived; and the court, having heard the evidence and argument of counsel, finds the issue for the plaintiff, and assesses his damages to the sum of one thousand eight hundred and six dollars and fifty-eight cents.

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of one thousand eight hundred and six dollars and fifty-eight cents, his damages aforesaid assessed, together with his costs and charges by him about his suit in this behalf expended, and that execution issue therefor.

Whereupon defendant enters a motion for a new trial herein.

28 And afterwards, to wit, on the sixteenth day of July, in the year of our Lord one thousand eight hundred and eighty-seven, came the parties, by their respective attorneys, and filed in the clerk's office of said court their stipulation to waive a jury, which said stipulation is in the words and figures following, to wit:

Stipulation Waiving a Jury.

In the Circuit Court of the United States for the Southern District of Illinois. June Term, A. D. 1887.

JOHN L. DODGE, Plaintiff,

vs.

THE STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS, Defendant.

Assumpsit.

Now, on this 16th day of July, 1887, come the parties to the above-entitled cause, by their attorneys, and by this stipulation agree that the said cause may be this day tried before the court without the intervention of a jury.

GEO. HUNT,
Attorney for Plaintiff.

M. HAY AND
GREENE & HUMPHREY,
Attorneys for Defendants.

(Indorsed:) Filed July 16, 1887. James F. Jones, clerk.

29 Then afterwards, to wit, on the said sixteenth day of July, in the June term of said court, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

2nd Trial & Judgment.

JOHN L. DODGE
vs.
STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS.

Assumpsit.

The motion for a new trial entered herein at a former term of this court is sustained by the court and a new trial awarded, and there-

upon the parties, by stipulation on file, waive a jury and consent that matters both of law and fact herein may be tried by the court; and the cause coming on for trial and the court having heard the evidence and argument of counsel, finds the issue for the plaintiff, and assesses his damages at the sum of two thousand three hundred and twenty-six dollars and eighty cents. The circuit justice and circuit judge having differed in opinion as to certain questions arising at the trial, said questions are embodied in a certificate of division, and the same is now filed in this case. It is ordered and
30 adjudged by the court that the plaintiff recover of the defendant the said sum of two thousand three hundred and twenty-six dollars and eighty cents, his damages aforesaid assessed, together with his costs and charges by him about his suit in this behalf expended, and that he have execution therefor; to which finding and judgment of the court the defendant then and there excepted.

Whereupon, on said sixteenth day of July, in the year last aforesaid, a certificate of division was filed in said clerk's office in the words and figures following, to wit:

Certificate of Division.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the Circuit Court, of the June Term, A. D. 1887.

JOHN L. DODGE

vs.

THE STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS.

Assumpsit.

Be it remembered that on the trial of the above-entitled cause before the court, the Hon. John M. Harlan, justice, presiding,
31 and the Hon. Walter Q. Gresham, circuit judge, without the intervention of a jury, which was waived in writing by the parties, the court found the following facts:

1. That the defendant was appointed depository for the Untited States district court for the southern district of Illinois about March 1st, 1873.

2. That on March 4th, 1873, George P. Bowen, clerk of the district court, made the first deposit of funds belonging in the registry of said district court with said bank, and the bank then, by direction of Clerk Bowen, opened an account with "The United States district court for the southern district of Illinois" and entered said deposit to the credit of said court, and that each deposit so made by the clerk was by the bank entered on its book and on the deposit book of the clerk to the credit of the particular case, naming the case with the

number, to which the funds so deposited belonged; that afterwards, by direction of the clerk, all deposits so made were entered by the bank in the name of "The United States district court for the southern district of Illinois," dropping the name but retaining the number of the case as hereinafter specially set forth.

32 3. That said clerk continued to make deposit of funds belonging in the registry of said court with said bank up to his death, which occurred in February, 1880, and said bank continued to enter said deposits to the credit of the court in the manner directed by the clerk.

4. That the entires of these deposits were made under direction of the clerk, both on the books of the bank and on the deposit book retained by the clerk in the following manner, viz.:

1873, March 4th.	To dep. 1971	$1,075 00
1874, January 30th.	To dep. 1425	225 00
1875, January 11th.	To dep. 1590	4,619 22
1876, January 24th.	To dep. 1637	5,200 00

5. That at the time each deposit was made the clerk brought to the bank the money to be deposited, together with his depositors' book and a ticket which would be like the following, differing only as to number, date, and amount:

"STATE NATIONAL BANK,
"SPRINGFIELD, ILLS., *March 4th*, 1873.

"Deposited by George P. Bowen, clerk, current funds, No. 1971 ---------- $1,075 00."

Whereupon the cashier of the bank would receive the funds and the ticket and enter in the clerk's deposit book, as well as in the
33 books of the bank, under the account with "The district court for the southern district of Illinois," as follows:

1873, March 4th. To dep. 1971 ---------- $1,075 00

That the bank understood when these entries were made that the numbers on either side of the account (as No. 1971 above) referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn.

6. That case No. 2105 was pending on the bankruptcy side of the court, and during the years 1879, 1880, and 1881 money to the amount of $38,300.00, realized from the estate of H. Sanford & Co. and belonging in said case, was paid into the registry of the court and by the clerk, Bowen, and his successor, Converse, deposited with said court from time to time and entered like all other deposits to the credit of said court, each deposit of the item of this fund being accompanied by a ticket from the clerk like the following, differing only as to date and amount, viz.:

"STATE NATIONAL BANK,"
SPRINGFIELD, ILLS., *July 25th*, 1879.

Deposited by George P. Bowen, clerk, current funds, No. 2105 ---------- $17,000 00

34 Said deposit account in said case being in full as follows:

The State National Bank of Springfield, Ills., in ac. with U. S. dist. court, S. dist. Ills.

1879, July 25th.	To dep.	2105		$17,000 00
Aug. 7th.	" "	2105		5,000 00
1880, Jan'y 10th.	" "	2105		4,000 00
Oct. 14th.	" "	2105		10,000 00
Nov. 12th.	" "	2105		2,000 00
1881, Feb'y 25th.	" "	2105		300 00

7. That the officers of the bank on receiving deposits accompanied by such ticket understood the "No. 2105" on the ticket to refer to a case of that number in the district court.

8. That the orders drawn by the court on the bank for funds in bankruptcy cases were in the following form, the blanks being filled out to suit each case:

Check No. —. Case No. —.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of —— ——, Bankrupt.

SPRINGFIELD, ILLS, —— —, 188–.

The State National Bank, U. S. depository.

Pay to the order of —— —— —— dollars, being in full for
35 the dividend of —— per cent. declared —— —, 188–, on —— claim for $——, proven against said bankrupt estate.
$——.

——, *Clerk.*

Countersigned:
——, *Judge.*

9. That the checks or orders so drawn and in controversy in this case are as follows:

Check No. 2. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of ANDREW GUNDY, Bankrupt.

SPRINGFIELD, ILLS., *May 12th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, five hundred and seventeen & $\frac{33}{100}$ dollars, being in full for the dividend

of 2½ per cent. declared April 30th, 1881, on his claim for $20,693.33, proven against said bankrupt's estate.

$517.33. M. B. CONVERSE, *Clerk.*

Countersigned:
S. H. TREAT, *Judge,*
Per J. F. C.

36 Check No. 2. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of JOSEPH BAILEY, Bankrupt.

SPRINGFIELD, ILLS., *May 12th,* 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, seventy-five & $\frac{48}{100}$ dollars, being in full for the dividend of $\frac{38}{100}$ per cent. declared April 30th, 1881, on his claim for $22,874.98, proven against said bankrupt's estate.

$75.48. M. B. CONVERSE, *Clerk.*

Countersigned:
S. H. TREAT, *Judge,*
Per J. F. C.

Check No. 3. Case 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of ABNER P. WOODWORTH, Bankrupt.

SPRINGFIELD, ILLS., *May 12th,* 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, seven hundred and twenty-four & $\frac{26}{100}$ dollars, being in full for the
37 dividend of 2½ per cent. declared April 30th, 1881, on his claim for $20,693.33, proven against said bankrupt's estate.

$724.26. M. B. CONVERSE, *Clerk.*

Countersigned:
S. H. TREAT, *Judge,*
Per J. F. C.

Check No. 3. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of JOSEPH BAILEY, Bankrupt.

SPRINGFIELD, ILLS., *May* 12*th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, attorney for John L. Dodge, sixty-eight & $\frac{29}{100}$ dollars, being in full for the dividend of $\frac{33}{100}$ per cent. declared April 30th, 1881, on his claim for $20,693.33, proven against said bankrupt's estate.

$68.29. M. B. CONVERSE, *Clerk.*

Countersigned:
S. H. TREAT, *Judge,*
Per J. F. C.

Check No. 27. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

38 In the Matter of H. SANDFORD & Co., Bankrupts.

SPRINGFIELD, ILLS., *May* 12*th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, one hundred and sixty & $\frac{12}{100}$ dollars, being in full for the dividend of $\frac{7}{10}$ per cent. declared April 30th, 1881, on his claim for $22,874.98, proven against said bankrupts' estate.

$160.12. M. P. CONVERSE, *Clerk.*

Countersigned:
S. H. TREAT, *Judge,*
Per J. F. C.

Check No. 28. Case No. 2105.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of H. SANDFORD & Co., Bankrupts.

SPRINGFIELD, ILLS., *May* 12*th*, 1881.

The State National Bank, U. S. depository.

Pay to the order of George Hunt, att'y for John L. Dodge, one hundred and forty-four & $\frac{85}{100}$ dollars, being in full for the dividend of $\frac{7}{10}$ per cent. declared April 30th, 1881, on his claim for $20,693.33, proven against said bankrupts' estate.

$144.85. M. B. CONVERSE, *Clerk.*

Countersigned:
S. H. TREAT, *Judge*,
Per J. F. C.

39 9½. That Andrew Gundy, Joseph Bailey, Abner P. Woodworth, and Hiram Sandford were all members of the firm of H. Sandford & Co., whose case is numbered 2105 herein, and that all of said parties were each individually adjudged bankrupts in said cause.

10. That said checks were presented at the bank for payment and payment refused, and the checks were protested for non-payment June 27th, 1881.

11. That the funds actually belonging to said case No. 2105 and deposited with said bank in manner aforesaid were sufficient to pay all checks drawn by the clerk and countersigned by the judge in favor of creditors in said case, including said checks in controversy, the funds so deposited amounting to $38,300.00 as aforesaid, and all checks drawn thereon, including the checks in controversy in this suit, amounting to 33,356.19, leaving a balance to the credit of said case of $4,943.81.

12. That the bank, before the presentation of the checks in controversy, had actually paid off on checks similar to the above, signed by the clerk and countersigned by the judge, and
40 differing only as to number of case, names, dates, and amounts, all the funds ever deposited with it to the credit of the court, many of such checks being drawn, as indicated therein, in cases in which no deposits had been made by the clerk.

13. That from the time of the first deposit with said bank, as depository of said court, up to the death of said Bowen, in February, 1880, the bank balanced the account with said court nine different times, returning all the checks to the clerk at each balancing and entering the case, No., and amount of each check so returned in the depositor's book of the clerk, these balances being struck at the following dates and showing each time the general balance to the credit of the court as follows, viz:

August 30th, 1877	$13,691 57
December 8th, 1877	11,024 74
January 5th, 1878	7,853 04
January 23rd, 1879	8,594 00
February 28th, 1879	11,456 01
June 2nd, 1879	27,095 36
August 2nd, 1879	28,273 82
October 30th, 1879	21,244 48
January 10, 1880	32,670 57

41 14. That the last balancing of said account, showing how it stood when the bank refused to pay the check in controversy, was in July, 1881, when the account showed a balance of $43.13 against the court.

15. That the bank always treated the account as an entirety and paid out of it all checks drawn by the clerk and countersigned by the judge until the deposits were exhausted, and in so doing the deposits were exhausted before the drawing and presentation of the checks in controversy, many of such checks so paid having been drawn in cases, as indicated by the numbers, in which no deposit had been made by the clerk.

16. That the bank was never served with a copy of the order of the district court appointing it a depository of the court, but its cashier was orally informed thereof by the clerk of the court, and thereafter the bank acted as such depository, receiving and paying out money under the orders of the clerk, countersigned by the judge as above given.

17. That the bank never was furnished with a copy of rule XXVIII in bankruptcy and had no actual knowledge of the rule.

18. That neither the clerk, Bowen, nor his successor, Converse, presented to the district court at each or any regular session
42 of said court after the defendant was so appointed depository the account and voucher required by sec. 798, Rev. Statutes U. S.

19. That neither of these clerks made or was required to make at any time after the defendant was appointed depository the monthly report provided for by rule XXVIII in bankruptcy.

20. That the civil and criminal and admiralty cases in the district court are numbered from one, consecutively, and at the time the deposit- in question were made there were two cases numbered 2105 in the district court. There was no evidence that deposits were or were not made in this bank in favor of or checks drawn on any other number 2105 than those drawn in this bankruptcy case; and the said cause having been heard before the undersigned, John M. Harlan, circuit justice, and Walter Q. Gresham, circuit judge, and we, the said judges holding said court, having found and agreed upon the foregoing facts and having differed in opinion on the following questions of law, upon the determination of which the proper judgment to be rendered in said cause depends, do certify the
43 same to the Supreme Court of the United States—that is to say:

First. Was it the duty of plaintiff in error to keep a separate account with each case in bankruptcy in which deposits were made in the bank?

Second. Was it the duty of plaintiff in error to refuse any check drawn in the name of the court and countersigned by the judge thereof unless such check specified the case in bankruptcy, on account of which the same was drawn, and there were funds in the bank to the credit of such cause?

Third. Did the failure of the bank to keep such separate accounts or its action in paying out all the funds deposited to the credit of

the court on checks drawn generally, leaving no funds to meet the checks in controversy, render the bank liable in this action?

Fourth. Did the fact that the defendant bank paid out and exhausted all the funds placed to the credit of the court on checks, some of which did not bear the number of any case from which funds had been derived, render the defendant liable on the checks in controversy, when, if separate accounts had been kept with
44 each case or number, there would have been funds to the credit of case No. 2105 sufficient to satisfy said checks?

Fifth. Notwithstanding the fact that the defendant bank opened an account with "The United States district court for the southern district of Illinois" and credited the funds received in bankrupt cases generally to the credit of said court "in the manner directed by the clerk" of said court, and notwithstanding the further fact that from time to time the bank settled said account with said court as a general account, was it, nevertheless, the duty of said bank to keep the funds received in each case of bankruptcy as a separate fund to be applied only to the payment of such checks as were drawn in and numbered in the particular case from which such funds were derived?

Sixth. Did the fact that the bank understood when deposits were made that the numbers on either side of the account, as 2105 in this case, referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn
45 require the bank to keep the funds belonging to such case for the payment of checks drawn therein, notwithstanding the fact that the account was opened and kept as a general account with the court, as directed by the clerk of the court, and had from time to time been settled with the court as a general account?

Seventh. Did the fact that the bank understood when deposits were made that the numbers on either side of the account, as 2105 in this case, referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn require the bank to keep the funds belonging to such case for the payment of checks drawn therein?

Eighth. Was the fact that the bank understood when deposits were made that the numbers on either side of the account, as 2105 in this case, in which the deposit in the first place was made and in which the check in the second place was drawn sufficient notice to the bank of the nature of such deposit to justify it in refusing to pay out any of the funds arising therefrom on checks drawn,
46 as indicated therein, in cases in which no deposits had been made by the clerk?

And the said John M. Harlan, the presiding justice, being of the opinion that each of the above questions should be answered in the affirmative, and so ruling, judgment was entered accordingly.

And the said Walter Q. Gresham, circuit judge, being of the opin-

ion that the said questions should be answered in the negative, this certificate of division, with special findings aforesaid, is ordered to be entered.

JOHN M. HARLAN,
Circuit Justice.
WALTER Q. GRESHAM,
Circuit Judge.

(Indorsed:) Filed July 16, 1887. James T. Jones, clerk.

And afterwards, to wit, on the said sixteenth day of July, in the June term of said court, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

47 *Order Allowing Writ of Error.*

JOHN L. DODGE
vs.
THE STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS.

Assumpsit.

This day comes the defendant, by its attorneys, and sues for a writ of error from the Supreme Court of the United States, directed to this court, which is allowed upon its entering into a bond to the plaintiff in the penalty of $5,000, to be approved by the court, within sixty days from this date and conditioned as the law directs.

Then afterwards, on the nineteenth day of August, in the year last aforesaid, came again said defendant, by its attorneys, and filed in the clerk's office of said court its bond in error herein in words and figures following, to wit:

Bond on Writ of Error.

In the United States Circuit Court, Southern District of Illinois.
June Term, A. D. 1887.

48 Know all men by these presents that we, The State National Bank of Springfield, Illinois, as principal, and S. H. Jones, as surety, are held and firmly bound unto John L. Dodge in the sum of five thousand dollars, to be paid to the said John L. Dodge or his assigns; for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, firmly by these presents.

Whereas the said State National Bank of Springfield, Illinois, hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the said circuit court in the case of John L. Dodge against The State National Bank of Springfield, Illinois:

Now, therefore, the condition of this obligation is such that if the above-named State National Bank of Springfield, Illinois, shall

prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

In witness whereof the seal of the said State National Bank is hereunto attached by its president and the hand and seal of
49 said surety is hereunto attached this 10 day of Aug., A. D. 1887.

THE STATE NAT. BANK OF SPRINGFIELD, ILLS.,
By S. H. JONES, *Pres't.*
S. H. JONES, *Security.*

Approved:
W. Q. GRESHAM,
Circuit Judge.

(Indorsed:) Filed August 19, 1887. James T. Jones, clerk.

And heretofore, to wit, on the sixteenth day of July, of the year last aforesaid, came the parties, by their attorneys, and filed in the clerk's office of said court their stipulation to submit this cause under rule 20 of the Supreme Court, which stipulation is as follows, to wit:

Stipulation to Submit Under Rule 20.

In the Circuit Court of the United States for the Southern District of Illinois.

JOHN L. DODGE
vs.
THE STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS.

Assumpsit.

50 In the above-entitled cause it is hereby stipulated and agreed by the parties thereto, by their respective attorneys, that said cause shall, upon the filing of a certificate of division, signed by the judges hearing the same, be submitted to the Supreme Court of the United States under the 20th rule of said Supreme Court.

GEO. HUNT, *Att'y for Pl'ff.*
M. HAY AND GREENE & HUMPHREY,
Att'ys for Def't.

(Indorsed:) Filed July 16, 1887. James T. Jones, clerk.

Certificate.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the

foregoing is a true and complete transcript of all the papers filed and proceedings thereon had in a certain cause wherein John
51 L. Dodge is plaintiff and The State National Bank of Springfield, Illinois, is defendant, as the same appear of file and record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this first day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

{ The Seal of the Circuit Court of the United States for the South. Dist. Ill. }

JAMES T. JONES, *Clerk.*

52 THE UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

To John L. Dodge, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in clerk's office of the circuit court of the United States for the southern district of Illinois, wherein The State National Bank of Springfield, Illinois, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties aforesaid in that behalf.

Witness the Hon. Walter Q. Gresham, judge of the circuit court of the United States for the seventh judicial circuit, at Springfield, in said district, this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the 112th year.

W. Q. GRESHAM,
Circuit Judge of the U. S., 7th Judicial Circuit.

53 I acknowledge service of the above citation.

JOHN L. DODGE,
By GEO. HUNT,
His Attorney.

[Endorsed:] Supreme Court United States. State National Bank *v.* John L. Dodge. Citation.

Endorsed on cover: S. Illinois C. C. U. S. No. 1118. The State National Bank of Springfield, Illinois, plaintiff in error, *vs.* John L. Dodge. Filed October 6, 1887.

124-333

Office Supreme Court U. S.
FILED.
DEC. 27 1887
JAMES H. McKENNEY.
CLERK.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1118.

THE STATE NATIONAL BANK, OF SPRINGFIELD, ILLINOIS,
Plaintiff in Error.

vs.

JOHN L. DODGE,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

MILTON HAY,
HENRY S. GREENE,
SPRINGFIELD, ILL.,
Counsel for Plaintiff in Error.

SPRINGFIELD, ILL.:
H. W. ROKKER, PRINTER AND BINDER.
1887.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1118.

THE STATE NATIONAL BANK, OF SPRINGFIELD, ILLINOIS,
Plaintiff in Error.

vs.

JOHN L. DODGE,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The amount involved in this particular case is only about $2,500, but there are other cases depending upon the result of this litigation, which, in the aggregate, involve large sums of money. We therefore invoke the close attention of the court to the questions herein presented.

ABSTRACT OR STATEMENT OF THE CASE.

The facts involved in this case, as contained in the certificate of division, on pages 14 to 22 of the printed record, may be briefly stated as follows:

1. The State National Bank, of Springfield, Illinois, was appointed a depository for the United States District Court for the Southern District of Illinois, about March 1, 1873.

2. That on the 4th day of March, 1873, George P. Bowen, the Clerk of said District Court, opened an account with said bank and made a deposit of money, and by direction of said Clerk, the account was entitled,

"STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS,
In account with
THE DISTRICT COURT OF THE UNITED STATES,
For the Southern District of Illinois."

That for a time each deposit of money, as made, was by the bank entered on its books, and on the deposit book of said clerk, to the credit of the particular case to which the deposit belonged, giving the name and number of the case; but that very soon thereafter by direction of said clerk, the name or title of the case was omitted, and deposits were made retaining the number of the case only.

3. That said clerk continued so to make deposits to the credit of said court, as above specified, until February, 1880, when he died.

4. That the entries of these deposits were made under the direction of the clerk, both on the books of the bank and on the deposit book retained by the clerk, in the following manner, viz:

1873.	Mar. 4.	To Dep.	1971—	$1,075.00.
1874.	Jan. 30.	To Dep.	1425—	225.00.
1875.	Jan. 11.	To Dep.	1590—	4,619.22.
1876.	Jan. 24.	To Dep.	1637—	5,200.00.

5. That at the time each deposit was made, the clerk brought the money to the bank, together with his depositor's book and a ticket, which would be like the following, except as to number, date and amount.

"STATE NATIONAL BANK,
"Springfield, Illinois, Mar. 4, 1873.
"DEPOSITED BY GEORGE P. BOWEN, CLERK.
"Current funds—No. 1971.....$1,075.00."

Whereupon the cashier of the bank would receive the money and the ticket, and would enter in the clerk's deposit book, as well as

on the books of the bank, under the account with "The District Court of the United States for the Southern District of Illinois," as follows:

"1873. Mar. 4. To Dep. 1971—$1,075.00."

That the bank understood that the numbers (as 1971 above) referred to the case in which deposits were made or checks drawn.

6. That there was a case numbered 2105, pending on the bankruptcy side of said court, and that during the years 1879, 1880 and 1881, money to the amount of $38,300, realized from the estate of H. Sandford & Co., and belonging in said case, was paid into the registry of said court and by the clerk deposited with the bank and entered like all other deposits to the credit of the court, and that each deposit was accompanied by a ticket from the clerk like the following, differing only as to date and amount:

"STATE NATIONAL BANK,
"Springfield, Ill., July 25, 1879.
"DEPOSITED BY GEORGE P. BOWEN, CLERK.
"Current funds—No. 2105.....$17,000."

7. That the officers of the bank on receiving deposits accompanied by such ticket, understood the "No 2105" on the ticket to refer to a case of that number in the district court.

8. That the orders drawn by the court on the bank were in the following form, the blanks being filled to suit each case:

Check No. —. IN THE DISTRICT COURT OF THE UNITED STATES, *Case No.*——
For the Southern District of Illinois.

In the matter of.....Bankrupt.

Springfield, Ill......188..

The State National Bank,

U. S. DEPOSITORY.

Pay to the order of.....

.....DOLLARS,

being in full for the dividend of.....per cent. declared.....188..

on.....claim for $..... proven against said Bankrupt estate.

.....*Clerk.*

Countersigned:.....*Judge.*

9. That the checks or orders drawn by the court, and in controversy in this case, were in the following form, but differing in number, date, amount, and the name of the bankrupt:

Countersigned: S. H. TREAT, *Judge.* Per J. F. C.

Check No. 2. IN THE DISTRICT COURT OF THE UNITED STATES, For the Southern District of Illinois. *Case No. 2105.*

In the matter of ANDREW GUNDY, Bankrupt.

Springfield, Ill., May 12, 1881.

The State National Bank,

U. S. DEPOSITORY.

Pay to the order of GEORGE HUNT, Attorney for JOHN L. DODGE,

Five Hundred and seventeen and 33-100 Dollars, being in full for the dividend of 2½ per cent. declared April 30th, 1881, on his claim for $20,693.13, proven against said Bankrupt's estate.

$517.33 M. B. CONVERSE, *Clerk.*

That the next check in controversy was also check No. 2, for $75.48, and contained the words, "In the matter of Joseph Bailey, bankrupt."

That the third check in controversy was check No. 3, for $724.26, and contained the words, "In the matter of Abner P. Woodworth, bankrupt."

That the fourth check in controversy was also check No. 3, for $68.29, and contained the words, "In the matter of Joseph Bailey, bankrupt."

That the fifth check in controversy was check No. 27, for $160.12, and contained the words, "In the matter of H. Sandford & Co., bankrupts."

That the sixth check in controversy was check No. 28, for $144.85, and contained the words, "In the matter of H. Sandford & Co., bankrupts."

9½. That Andrew Gundy, Joseph Bailey, Abn r P. Woodworth and Hiram Sandford, were all members ot the firm of H. Sandford & Co., and were all adjudged bankrupts in the cause of H. Sandford & Co., No. 2105.

10. That the six checks above in controversy were presented to the bank for payment and refused, June 27, 1881.

11. That the funds actually belonging to case No. 2105, and deposited as aforesaid, were sufficient to pay all checks drawn in favor of creditors in said cause.

12. That the bank, before the presentation of the checks in controversy, had actually paid out, on checks similar to the above, signed by the clerk and countersigned by the judge, and differing only as to the number of the case, names, dates and

amounts, all the funds ever deposited with it to the credit of the court,—many of said checks being drawn, as indicated therein, in cases in which no deposit had been made by the clerk.

13. That from the time of the first deposit with said bank or depository of said court, up to the death of said Bowen, in February, 1880, the bank balanced the account with said court nine different times, returning all the checks to the clerk at each balancing, and entering the case, number and amount of each check so returned in the depositor's book of the clerk, these balances being struck at the following dates, and showing each time the general balance to the credit of the court, as follows, viz:

August 30, 1877	$13,691 57
December 3, 1877	11,024 74
January 5, 1878	7,853 04
January 23, 1879	8,594 00
February 28, 1870	11,466 01
June 2, 1879	27,095 36
August 2, 1879	28,278 82
October 30, 1879	21,224 48
January 10, 1880	32,670 57

14. That the last balancing of said accounts showing how it stood when the bank refused to pay the checks in controversy, was in July 1881, when the account showed a balance of $43.13 against the court.

15. That the bank always treated the account as an entirety, and paid out of it all checks drawn by the clerk and countersigned by the judge, until the deposits were exhausted, and in so doing the deposits were exhausted before the drawing and presentation of the checks in controversy, many of said checks so paid having been drawn in cases as indicated by the numbers, in which no deposits had been made by the clerk.

16. That the bank was never served with a copy of the order of the court appointing it a depository, but the cashier was orally informed thereof by the clerk, and the bank acted as such depository as above stated.

17. That the bank never was furnished with a copy of Rule 28 in bankruptcy, and had no actual knowledge of the rule.

18. That neither the clerk, Bowen, nor his successor, Converse, presented to the District Court, at each or any regular session of said court, after the defendant was so appointed depository, the account and vouchers required by Sec. 798, Rev. Stat. U. S.

19. That neither of the clerks made, or were required to make, at any time after defendant was appointed depository, the monthly report provided for by Rule 28 in Bankruptcy.

20. That the civil and criminal and admiralty cases in the District Court are numbered from one, consecutively, and the bankruptcy cases are separately numbered from one, consecutively, and, at the time the deposits in question were made, there were two cases numbered 2105 in the District Court. There was no evidence that deposits were or were not made in this bank, in favor of, or checks drawn on, any other number 2105 than those drawn in this bankruptcy case.

Upon the foregoing findings, the judgment of the court was for the plaintiff, accompanied by the following certificate of division:

"And the said cause having been heard before the undersigned, John M. Harlan, circuit justice and Walter I. Gresham, circuit judge, and we, the said judges, holding said court, having found and agreed upon the foregoing facts and having differed in opinion on the following questions of law, upon the determination of which the proper judgment to be rendered in said cause depends, do certify the same to the Supreme Court of the United States—that is to say.

"*First*—Was it the duty of plaintiff in error to keep a separate account with each case in bankrupcy in which deposits were made in the bank?

"*Second*—Was it the duty of plaintiff in error to refuse any check drawn in the name of the court and countersigned by the judge thereof, unless such check specified the case in bankruptcy, on account of which the same was drawn, and there were funds in the bank to the credit of said cause?

"*Third*—Did the failure of the bank to keep such separate accounts or its action in paying out all the funds deposited to the credit of the court on checks drawn generally, leaving no funds to meet the checks in controversy, render the bank liable in this action?

"*Fourth*—Did the fact that the defendant bank paid out and exhausted all the funds placed to the credit of the court on checks, some of which did not bear the number of any case from which funds had been derived, render the defendant liable on the checks in controversy, when, if separate accounts had been kept with each case or number, there would have been funds to the credit of case No. 2105, sufficient to satisfy said checks?

"*Fifth*—Notwithstanding the fact that the defendant bank opened an account with the "United States District Court for the Southern District of Illinois," and credited the funds received in bankrupt cases generally to the credit of said court "in the manner directed by the clerk" of said court, and notwithstanding the further fact that from time to time the bank settled said account with said court as a general account, was it, nevertheless,

the duty of said bank to keep the funds received in each case as a separate fund only to be applied to the payment of such checks as were drawn and numbered in the particular case from which such funds were derived?

"*Sixth*—Did the fact that the bank understood, when the deposits were made, that the numbers on either side of the account, as 2105 in this case, referred to the case in which the deposit in the first place was made, and in which the check in the second place was drawn, require the bank to keep the funds belonging in such case for the payment of checks drawn therein, notwithstanding the fact that the account was opened and kept as a general account with the court, as directed by the clerk of the court, and had from time to time been settled with the court as a general account?

"*Seventh*—Did the fact that the bank understood when deposits were made, that the numbers on either side of the account, as 2105 in this case, referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn, require the bank to keep the funds belonging to such case for the payment of checks drawn therein?

"*Eighth*—Was the fact that the bank understood when deposits were made, that the numbers on either side of the account, as 2105 in this case, referred to the case in which the deposit in the first place was made, and in which the check in the second place was drawn, sufficient notice to the bank of the nature of such deposit to justify it in refusing to pay out any of the funds arising therefrom on checks drawn, as indicated therein, in cases in which no deposits had been made by the clerk?

"And the said John M. Harlan, the presiding justice, being of opinion that each of the above questions should be answered in the affirmative, and so ruling, judgment was entered accordingly.

"And the said Walter Q. Gresham, circuit judge, being of the opinion that the said questions should be answered in the negative, this certificate of division, with special findings aforesaid, is ordered to be entered."

ERRORS ASSIGNED.

1st. The Court erred in its answer to each of the several questions arising in the case.

2nd. The Court erred in rendering judgment for the plaintiff.

ARGUMENT.

INTRODUCTORY.

Although the questions presented by the certificate of division are variously shaped, it will readily be perceived that substantially but one question is presented, and that is whether the bank was warranted in keeping its account with the District Court as a unit,—in other words, a general account,—or whether it was its duty to keep a separate account with each bankrupt estate. The answer of the court below was that it was the duty of the bank to keep such separate account with each bankrupt estate, and this, with the consequent judgment thereon, is the error complained of.

It is claimed, by defendant in error, that money deposited belonging to case No. 2105 was improperly paid out by the bank, on checks drawn by the court to pay dividends in other cases in which sufficient funds had not been deposited to meet the checks. On the other hand, it is claimed by the bank that the deposits were made *to the credit of the court;* that all checks were drawn by the court against the fund to its credit, and not against a fund to the credit of any particular case; that the bank had the right to presume that the court, as trustee, was in the proper performance of its duty, and that the bank was bound to honor all checks drawn by the court, as such trustee.

In short, the question simply is, what was the duty of the bank in the premises, and has there been a breach of such duty? For all will admit that, unless the bank has been guilty of the breach of some duty imposed upon it by law, it cannot rightfully be held liable in this suit.

It is certainly beyond dispute, that the primary cause of the loss here, which must fall upon some one, was the breach of duty by the clerk, (Bowen), in failing to make the deposit of moneys in his hands belonging to the court. He missappropriated the money which he should have deposited. Had he performed his duty in this respect, the fund on deposit would have been ample to meet all checks drawn by the court in all the cases. There would then have been no necessity for keeping a separate account, by the bank, with each estate, because the amount of the whole fund would have exactly balanced with the total amount of all the checks. There would then have been no occasion for claiming that the bank, an agent of the court for the safe-keeping of its funds held in trust, should have acted as a check upon the court, and should have controlled the application of the fund, even as against the express directions of its principal.

Of the bank, it may at least be said, without risk of denial, that it performed its duty faithfully, as it understood it. It kept the money safely—burglars did not break in and carry it off. It was not embezzled or stolen by the bank or its officers. Every cent it received it has accounted for. Every cent placed in its custody by the court, has been paid out by the order of the same court—not only to the parties to whom the court directed it to be paid, but to parties who were entitled to receive such amounts from the court—parties whose money had passed into the possession of the court as a trust fund to be paid to them, as was done, and who were as much entitled to receive it from the court as defendant in error.

It is evident that if the bank had kept the account, as is now claimed it should have done, the loss would have occurred just the same, except that it would have been transferred to other

creditors of the court. The parties who are now suing would have obtained their money, but the other creditors, who have been, it is said, improperly paid—whose money had, in fact, been paid into court in trust for them, and whose equities against the court were, therefore, just as great as those of the defendant in error—would have lost the money to which they were entitled. Their only remedy, it is conceded, would be against the sureties of the defaulting clerk.

Before the court shall hold that the loss must fall upon the bank, it is reasonable to insist that defendant in error shall point out definitely the duty resting upon the bank which has been violated, and whence that duty arose. It is insisted that the duty in question was to keep the account of the money deposited and drawn in each case separate from all others, and to have refused the payment of all checks drawn in any case beyond the amount to the credit of such case. This duty, if it existed, must have arisen either from the directions given to the bank, or by force of some rule or law governing such deposits.

We shall inquire as to whether such duty was imposed by either of the modes suggested, and if we find that it was not, then we may safely conclude that it did not, in fact, exist.

THE DUTY TO KEEP A SEPARATE ACCOUNT DID NOT AR SE FROM ANY DIRECTIONS GIVEN BY THE CLERK.

In the first place, it is conceded, the bank kept the account in the exact manner in which it was directed to keep it by the clerk. It is not denied that the bank in all things followed the directions of the clerk. The clerk, the officer, the arm of court, the medium through whom the account between the court and the bank was opened, directed from the beginning how the business should be conducted, and during its progress repeatedly approved of the

course which was pursued. The clerk directed the account to be opened with the District Court, and the funds to be credited to the court, and not to the particular case from which they were derived. It is true, that in the findings of the court, it is stated (see 2d finding, p. 14 of Record) "that each deposit so made by the clerk was, by the bank, entered on its book and on the deposit book of the clerk to the credit of the particular case, naming the case with the number to which the funds so deposited belonged." The connection, however, fully explains this finding to mean simply that the entry imported that the funds had been derived from the case in bankruptcy represented by the number. It is in this sense only that the funds are referred to as *credited* to that case, or as *belonging* to that case, as it is distinctly found that all the deposits were entered to the credit of the "District Court." In a sub-sense, it was a credit also to the particular bankrupt estate,—that is to say, the entry showed that the fund so deposited had been derived from that estate. The ordinary custom of a depositor to have the bank enter the name of the person from whom the money is received opposite the deposit, illustrates the import and effect of such an entry. Such an entry in no wise imported any notice to, or duty upon, the bank to keep or deal with the deposit as a separate account, when it was expressly directed to be entered and kept as all other deposits, to the general account and credit of the "District Court." The account was balanced, at intervals, nine different times, the checks cashed being returned with the balanced books to the clerk, so that he had full knowledge of, and acquiesced in, the manner in which the account was being kept. There can be no question but that the account was kept by the bank as directed by the court through its clerk.

It therefore follows that if the duty to keep separate accounts, arose in any way, it arose not because of the direction of the clerk, but in spite of such directions. To sustain the position it is necessary to insist that, because of the manner in which the account was kept, the bank was chargeable with notice of facts which made it its duty to act in direct opposition to the orders of the court through its officer—that made it its duty to refuse the payment of checks drawn upon a fund in its custody to the credit of the drawer.

In this view of the case, the duties of the bank were not merely to act as a safe depository of the funds of the court, but the bank had an active duty to perform in regard to the distribution of the fund; it was not to permit the court to control the money in its custody, further than to distribute the identical fund received in each case to the distributees of that fund. If the court attempted any other application of the money, then it became the duty of the depository of the court to defy the court and refuse to comply with its demands.

THE MEMORANDA ON THE CHECKS COULD IMPOSE NO BURDEN ON THE BANK.

The facts which are supposed to have been sufficient to charge the bank with such notice, and to have imposed this duty, are simply the memoranda which accompanied the deposit and the checks drawn.

The most that can be claimed for the memoranda is, that the number accompanying the deposit informed the bank that the sum deposited was derived from the case bearing that number, and the memoranda on the check informed the bank that the payment represented by the check was made to a party entitled to a dividend in a particular case noted on such check.

Was this a sufficient reason to require the bank to disregard the orders of the clerk, and did it render itself liable for failing to disregard them?

We contend that the bank had a right to assume, as it did assume, that the memoranda were for the convenience of the court and its officers, and imposed no additional burden upon the depository.

In the first place, such assumption was in accordance with the direction of the court through the clerk. The bank had a right to presume that the court and its officers were properly performing their duty in the distribution of the trust fund. The Supreme Court of the United States, in *National Bank* v. *Insurance Co.*, 104 U. S. 54, say:

"A bank account, it is true, even when it is a trust fund, and designated as such by being kept in the name of the depositor as *trustee*, differs from other trust funds which are permanently invested for the sake of being held as such; for a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is, that the former will pay according to the checks of the latter and when drawn in proper form, the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly."

The court will see that the foregoing is precisely in point on the question at issue here. The deposits were made to the credit of the court. There can be no dispute but that the account was rightfnlly kept in the name of the court, for the law expressly required it to be so kept. It could, in fact, be kept in no other way. The money was deposited by authority of the court, and the same authority only could withdraw it. The deposit could not be to the credit of any *case*, because the case itself could not make the deposit, or draw it out. The court, in its own name, deposited the funds, and by the same description withdrew them.

There was nothing in the withdrawal to indicate that the trustee was appropriating the money to its private ends, nor was such in fact the case. All the money was withdrawn by the trustee, *as such*, in what purported to be the fulfillment of the trust, and here the principle cited from the decision of the Supreme Court has its application. As is there said, so long as the account is drawn against by the trustee, *as such*, "the bank is bound to presume that the trustee is in the course of lawfully performing his duty." The bank has no right to control the trustee in the execution of the trust. The trustee is responsible for that, and is clothed with authority to act. The bank, however, would have no right to treat the fund as the private property of the trustee, and the beneficiaries of the fund would have the right to follow the money into the hands of the bank to prevent its misappropriation. To this extent only do the authorities go.

UNTIL NOTICE TO THE CONTRARY, THE TRUSTEE PRESUMED TO BE IN THE PERFORMANCE OF HIS DUTY.

The case just referred to in the 104th U. S. 54, illustrates very clearly the distinction between the case at bar and that class of cases within the principle of which, it is contended, this case is included.

In the case cited, one A. H. Dillon, Jr., was engaged in business, in Baltimore, as the general agent of the Connecticut Life Insurance Company. It was his duty to collect and receive premiums, on policies issued by the company, from persons residing within his territory, and remit the same to the company, at Hartford. This he usually did twice a month, finally accounting for the business of each month at its close. The mode of remitting was by checks upon a Baltimore bank, to the order of the secretary of the company. To this end, he opened an account with

the bank, designated on its books, as follows: "*Dr.*—CENTRAL NATIONAL BANK, in account with A. H. Dillon, Jr., General Agent,—*Cr.*" To the credit of this account he deposited, from time to time, premiums collected for the insurance company, and remitted twice a month his checks, signed by him *as general agent*, and payable to the order of Jacob L. Greene, secretary of the appellee. In the course of his dealings with the bank, he borrowed, on his private account, $10,000, for which he gave his personal note. The note not being paid, the bank charged this amount against his account as "gen'l ag't." The insurance company brought suit against the bank, and recovered the balance to the credit of Dillon, "gen'l ag't," including the amount charged to the note. The court held that the bank could not treat the trust fund, deposited with it as such, as the private property of Dillon, and offset their claim against him. After using the language already quoted, the court adds:

"But when against a bank account designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for personal obligation of the depositor, known to have been contracted for his private benefit, the bank must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation."

But it is in this same connection that the court say, that if the funds had been drawn against in proper form by the trustee, the bank would be bound to presume that he was in the proper performance of his duty. If, for instance, Dillon had drawn against the account, as "gen'l agent," in favor of other parties than his principal, it would then have presented a case parallel with the one at bar. The bank knew that he was agent for the Life Insurance Company, and that the fund on deposit belonged to that company. They knew, from the course of dealing, that money withdrawn on that account was invariably in favor of the insur-

ance company. And yet, if a check had been presented signed "A. H. Dillon, gen'l ag't," in favor of a stranger to the fund, the bank would have been bound to honor it, because they would be bound to presume that the trustee was in proper performance of his trust. It concerned them only to know that the depositor purported to be acting as trustee, and it was not their right or duty to interfere. So the Supreme Court decide in that case, and we confidently assert that no well considered case can be found which holds a contrary doctrine.

A number of cases are reviewed by the court, all of which maintain the same distinction. In *Duncan* v. *Jourdan*, 15 Wall. 165, Jourdan held certain stock as trustee, which he pledged with a bank to secure a loan for his own private benefit. The certificates of stock pledged showed on their face that they were held by him *as trustee for Mrs. M. T. B. Jourdan*, and the bank knew that the loan made on these collaterals was for his own private use. The court, of course, held that the bank was chargeable as a party to the breach of trust. The bank had no right to treat the trust fund as the private property of the trustee. *Shaw* v. *Spencer*, 100 Mass. 382, was a similar case, and decided the same way.

In the case of *Pennell* v. *Hurley*, 2 Col., C. C. 24, the depositor having two accounts, one in trust, the other in his own name, drew his check as trustee to pay his private debt to the banker, the court say:

"Money is due from A to B in trust for C. B is indebted to A on his own account. A, with knowledge of the trust, concurs with B in setting one debt against the other, which is done without C's consent. Can it be a question in equity whether such a transaction stand."

In *Bodenham* v. *Hoskins*, 2 De G. M. & G. 903, the principle was stated to be one acted upon daily by courts of equity,

"according to which a person who knows another to have in his hands, or under his control, moneys belonging to a third person, cannot deal with those moneys for his own private benefit, when the effect of that transaction is the commission of a fraud upon the owner."

In the case of *ex parte Kingston, in re Gross*, (Law Rep., 6 ch. App. 632), a county treasurer had two bank accounts, one headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The checks which he drew upon it were all headed "Police account," and appeared to have been drawn only for county purposes. For the purposes of interest, the bank treated the accounts as one account, and the interest on the balance in his favor was carried to the credit of his private account. The manager of the bank knew he was a county treasurer, and understood that he had been in the habit of paying county moneys into the bank. He absconded, his private account being overdrawn, and the police account being in credit. It was held that the bank was not entitled to set off the one account against the other, but that the county magistrate could recover the balance standing to the credit of the police account. Sir W. L. James, L. J., said: "In my mind, this case is infinitely stronger than those referred to during the argument in which a similar claim on the part of bankers was dissallowed; for in those cases the bankers relied on cheques received from the customers; *and if a banker receives cheques from a customer holding a trust account, he is not in general bound to inquire whether the cheque was properly drawn or not.* Here the customer has drawn no cheque, and the bankers are seeking to set off the balance on his private account against the balance in his favor, on what they know to be a trust account."

There is another class of cases cited by the Supreme Court in the case of *Bank* v. *Insurance Co., Supra,* which hold that when trust funds have been deposited in bank, the beneficiary may follow such funds, even when they have become mixed with the other money of the depositor. None of this class of cases bear any analogy to the one at bar.

A decision of the Supreme Court of Illinois—*Fifth Nat. Bank* v. *Hyde Park,* 101 Ill. 595—is very much in point, and is in full accord with the cases already cited. One Waldron, treasurer of the village of Hyde Park, kept an account with the bank as "Treasurer." He gave the bank a check on this account to pay a note of $50,000 for money he had previously borrowed in his own name, but which, at the time, he had represented to be for the use of the village. The court, after an extensive review of the authorities, concludes that the bank cannot be held liable unless it was a party to the breach of trust, and with knowledge of the fraud.

At page 606, the court say:

"It follows that, under the circumstances, at the time when the officers of this bank received payment of this loan, they were not aware that, as between the village of Hyde Park and Waldron, he had not lawfully and equitably the right to apply the public funds to this debt. They must be assumed to have known the law in relation to the transaction, but the law does not impute to them omniscience as to the facts. Taking the facts as these officers believed they were, and as they had good cause to believe, the payment would not have been a misappropriation of the funds."

Although the form of transaction indicated that the money of the village was received by the bank in payment of the private debt of the treasurer, yet it is held that the bank was justified in relying upon the representation of the officer as to the purpose of the loan.

The present case is infinitely stronger than the one cited. Here the bank was not even a party to the breach of trust, receiving no

direct or indirect benefit therefrom. Neither was there any appropriation of funds to the private purposes of the trustee, all the money being distributed to parties to whom the trustee was indebted on the trust account. Even if the appropriation, as made, was a wrongful diversion, yet "taking the facts as the officers of the bank had good cause to believe,"—from the conduct of the clerk,—"the payment would not have been a misappropriation of the funds."

Without quoting further, we invite the especial attention of the court to this opinion and the authorities therein reviewed.

THE BANK DEALT WITH THE MONEY IN A TRUST CAPACITY, AND SUSTAINED NO IMPROPER RELATIONS WITH THE TRUSTEE.

We repeat our assertion then, that the result of all the cases is simply to establish the proposition that when money is deposited with a bank in a trust capacity, the bank cannot deal with it as the private property of the depositor. In II Daniel on Negotiable Instruments, sec. 1612 *a*, the principle is stated thus:

> "If a deposit be made in a bank to the credit of a certain person as agent or trustee, the use of such terms would charge the bank with notice that the funds were there in a fiduciary relation; it would have no lien upon them for the private debts of the depositor, and if it permitted them to be used for his private purposes in transactions with the bank, it would be bound."

The principle is everywhere limited to the dealings by the depository with the trustee. In such case, the bank becomes a party to the breach of trust. The principle has never been extended, so far as we are aware, to breaches of trust by the trustee, to which the depository was not a party. It has never been extended to cases where the trustee, while purporting to be carrying out the trust, has misappropriated the funds by dealings with third parties. When the trustee, as such, directs the depository to pay the funds to a stranger, the depository is bound to honor the demand

It is not a party to the breach of trust, if any is committed, and it has no right to interfere with or control the action of the trustee. The beneficiary may, it is true, by interfering in time, stop the funds in the hands of the bank, and recover them.

Not only has this proposition never been disputed by the courts, but on the contrary, it has been expressly recognized and affirmed in the cases cited above. As is there said, when the depository is dealing with third persons, "the bank is bound to presume that the trustee is in the proper performance of his trust." (104 U. S. 54.)

The duties of a bank as to paying checks on a fund deposited by a trustee, is stated by Morse on Banking, at page 274, as follows:

"The bank will always be justified in making payments upon orders of the person who brought the deposit, or upon orders of any person whom he designates to control it, until it has notice that the ownership is claimed by somebody else, adversely to either of the parties. Mere notice that the ownership is elsewhere, is of no effect."

The manner in which the account was kept did not even afford notice to the bank that the money was being misapplied by the trustee; it in fact precluded any such notice. The memoranda accompanying the deposit and withdrawal of the funds merely informed the bank in the first place that the particular sum deposited was derived from a certain number or case, and in the second place that the payment represented by the check was to a party having a claim in a particular case. The bank could have no knowledge of the fact that the court or its officer was improperly withholding funds from deposit, because the account was, by direction of the court, kept as a unit, and not as a seperate account with each case. So long as the account was thus kept as a unit, so long as the entire deposits were kept to the

credit of the court, as a general fund to be drawn against by the court, it was practically impossible for the bank to know, by information furnished by the memoranda, that there was a deficiency in funds deposited in any particular case.

There were over two thousand cases on the bankruptcy docket of the court; there were also over two thousand cases on the civil and criminal and admiralty docket of the court, so that at the time the deposits in question were made, there were two cases numbered 2105 in the District Court. The court doubtless had several other depositories besides the plaintiff in error. There was nothing to prevent the court from depositing funds derived from a particular case in one depository, and drawing against the fund in another depository, to meet dividends in that case. So that even if the bank had been aware of the fact that the court was drawing to pay dividends in cases in which no deposits had been made with them, it might have supposed the money in that case was deposited elsewhere, or was still in possession of the court. No loss would have occurred to any one by this practice, if the officer of the court had performed his duty in regard to depositing funds.

THE BANK HAD NO NOTICE OF ANY IRREGULARITY, AND COULD NOT BE HELD ACCOUNTABLE FOR THE DISTRIBUTION OF THE FUND.

On the principle of the authorities cited, we have attempted to show that the bank would not be liable even with notice, in the absence of an adverse claim made by the beneficiary while the fund was still in the possession of the bank and under the direction of the court. But we say that in this case the facts appearing did not even afford notice to the bank of any irregularity.

The question may be simplified by supposing that deposits were made with plaintiff in error in but *one* case only. The funds in

that case are credited to the District Court, and a memorandum made as to the number of the case to which they belong. A check is presented at the bank drawn by the court and in proper form, directing the bank to pay A. B. a certain sum. The order is not drawn against funds to the credit of the case, but to the credit of the court, for in that name the money was deposited. What is the bank to do with this check? Its contract with the depositor and the law require it to pay the funds in its hand according to the orders of the depositor. The bank, if required to take any notice at all of the number on the check, which we deny, could only know that the court was ordering payment from funds derived from one case of a claim arising in another case, and, pray, why should the bank suppose that the court was guilty of a breach of trust in so ordering? The court was a judicial tribunal, and had power alike over all the funds. The order contained in the check is peremtory. It is: "State National Bank, pay to the order of A. B., one hundred dollars." *Not out of any special fnnd, but without qualification.* Of course if there is money deposited in one case only, the check must be paid out of that, if at all. Can there be any question as to the duty of the bank under such circumstances? It would necessarily be to pay the check. The bank would be bound to presume that the court was in the proper performance of its duty, and it would have no right to infer that the court or its officers were diverting the funds because the money deposited was derived from one estate, and the payments were made on account of another. It would have no right to interfere, even if it could make such inference. The bank is no party to the transaction between the court and the payee of the check. It is its duty to keep safely the money of the court until the court shall call for it, and then pay it to whomsoever the court shall direct. The use of a depository has no other

purpose than the safe keeping of the fund, and the depository can make no other inquiry on paying out the deposit, than relates to the question whether the order for the funds is drawn by the same party to whose credit they were placed.

If the bank in such case had presumed to pass upon the right of the court to thus distribute the fund, it could not know but that the court had advisedly ordered that a party having a claim against one estate should be paid from funds derived from another estate. It could not know but that the fund in the other case had been deposited in another place, or was otherwise in the possession of the court, or otherwise disposed of. It would be the hight of folly for the mere depository of the court to attempt to interfere with the administration or orders of its principal.

Thus we see that in the strongest case that could be put, that of a single deposit derived from a single case, there is no authority, in reason or precedent, for holding the bank accountable for the distribution of the fund when made by the trustee in its official capacity, to parties other than the bank. But in the present case, the notice that might be inferred from a single deposit is wholly beyond question, with hundreds or thousands of deposits belonging to as many different cases, all deposited as a common fund, to the credit of the court, and treated, by direction of the court, as a fund to be drawn against generally.

In the *Reilly case*, printed in full near the end of this brief, the Court say:

"Certainly a bank may properly make payments on checks of the person whose deposits it holds, until notice of some adverse claim. Otherwise there would be no safety for a corporation transacting a banking business with its customers. Applying these familiar principles, which accord with the common understanding of the manner in which banking business is usually transacted, the case in hand will present no serious

difficulty. It will be seen the account was kept by the bank in exact conformity with the act of Congress, Section 995. *Ut supra;* that is, it was kept as a unit in the name of the court, requiring funds coming under its control to be deposited. No one can insist with any show of reason that this section of the United States Statute made it the duty of the court to cause its depositary to keep a separate account with each case pending, or that had been adjusted from which the deposits may have been received by the court or its officers. That is the appropriate work of the officers of the court under its direct supervision. All the statute requires of the depository is, that it safely keep all trust funds intrusted to its custody by the court or its officers, and pay out the same on the checks or order of the court through its proper officers."

It may be contended that the effect of the number accompanying the deposit is to make the account as if it read:

"The State National Bank of Springfield, Illinois, in account with the United States District Court for the Southern District of Illinois, *on account of case 2105, in the bankrupt court.*"

This claim cannot be sustained, and if it could be, it would not affect the force of what has heretofore been said. In the first place, it is not true in fact, that the account was thus opened,—it was opened with the District Court simply, as the heading of the book shows. There was no direction to enter the deposit as on account of the case; on the contrary, the deposits were kept as one fund, by direction of the clerk, which of itself negatives the conclusion that the deposit was special.

The account being opened "in the name and to the credit of the court," the bank would have no right to credit the amount specially to any number, unless directed to do so either by the clerk or the law. Neither were the checks drawn against any special deposit, as an examination will show. The order is to pay a certain sum of money, not out of any special fund. There is no direction to charge the amount to any special fund, but the order to pay, which stands out separate and distinct from the rest of the check, is without qualification or limitation. If it were true that the

deposits were special, there must have been as many separate accounts as there were cases, and as many books as there were accounts. At least, each account must have been kept by itself in a separate page or book, and the order to pay would have been to charge to the account *against* which the check was drawn. Yet but *one* account was opened, the deposits being made indiscriminately and entered as belonging to one account, viz: to the account of the court. And the law, we shall see, required the credit to be so given and the account so kept.

There was no necessity or reason for requiring the bank to assume any duty whatever as to the distribution of the fund, beyond what it actually performed. The law entrusts the administration of all matters in bankruptcy to the District Court of the United States, and provides an ample corps of officers and functionaries for that purpose. The duties of such officers are strictly defined.

Rule No. 5 requires Registers in Bankruptcy to conduct certain proceedings in bankruptcy, such as the auditing and paying of costs, expenses and dividends, thus embracing all possible disbursements.

Ruld No. 28 requires the register to keep separate accounts with each estate. The same rule requires the clerk or assignee to keep a book, in which shall be entered all checks or drafts, with the order of time in which they are drawn, and that such checks or drafts shall be numbered in the case of each estate. This numbering of the deposits when made and of the checks when drawn, was solely for the use and convenience of the clerk, the court and the register, in the performance of their duties required by the rule. The assignee is required to pay into court the amount received by him from any estate, and rule 28 requires the clerk to deposit such money in one depository—that is, the money received.

in any one case shall be deposited in one depository, but the rule recognizes the right of the court to have several depositories. The clerk is required to make a report to the court of the funds received by him, and of deposits made by him, on the first Monday of every month, and the production of the bank book, showing all deposits in each particular case, by the number thereof, would furnish to the court the evidence of the deposit by him of all moneys received. The assignee is likewise required to file a report with the register, and all checks are drawn under the direct supervision of the court or the register, one or the other being required to countersign each of them.

Here, then, is a complete system of checks, and counter checks, which, if enforced by the court, renders the misappropriation or diversion of funds impossible. The books required to be kept, and the reports required to be made, show, at all times, the condition of any estate, the amount deposited, the amount withdrawn, and on what account.

Under such circumstances, the bank might well presume that the court was engaged in the proper administration of the trust, and hence give itself no concern as to whether the distribution was being made to the proper parties, especially when its manner of keeping the account was not only in accordance with the directions of the officer of the court, but, upon repeated settlements, was ratified and approved—approved not only by the clerk, but supposably by the court, to whom the clerk was, by law, required to make monthly reports. This oft repeated mode of balancing the account between the bank and the court, affords conclusive evidence that the case number on the checks was never designed or intended to be understood as requiring a special account with each fund, or that a check so drawn was drawn

against a special fund. If the design was to keep separate accounts, then each separate account should have been balanced, and the court would have so required.

We think the foregoing fully establishes the proposition that the duty to keep the account of each estate separate, and to refuse the payment of the checks drawn to make payment in cases in which the clerk had failed to make a deposit, did not arise from the manner in which the account was kept, or the memoranda connected therewith. It cannot rightfully be claimed that the memoranda had the effect of charging the bank with the loss; but the real purpose of the memoranda is so evident, that it is a matter of surprise to us that it should ever have been questioned.

It was of no importance to the bank that the checks should show the account for which they were drawn, but it was of the utmost importance to the court and its officers. The checks, when returned to the court, were not only receipts for the sums represented by them from the parties in whose favor they were drawn, but they were vouchers in the case showing the manner of distribution. The memoranda on the checks were obviously for the convenience of the depositor. So, also, with the number accompaning the deposit. The clerk was required to show to the court that he had deposited the funds received by him. It was, therefore, necessary that each deposit should be distinguished by some mark which the court and the clerk could identify, as showing that he had performed his duty.

The memoranda undoubtedly were for a purpose of some sort. To hold that purpose was for the convenience of the depositor, accords with reason and common sense, as well as with the acts of the parties. To hold that it was to control the bank in the payment of the checks, is contrary to all principle and precedent.

When a thing has a perfectly natural and sensible purpose, why give it an unnatural, strained construction?

As is well known to everyone who has any experience in keeping a bank account, it is a very common practice for a depositor to make a memoranda of the nature of the deposit, or of the account for which the check is drawn. Such memoranda, in practice, are always regarded as being for the convenience of the depositor. The bank pays attention to nothing but the signature and the order to pay; but the bank account, at the same time, affords to the depositor the means of knowing the condition of his affairs, or it may furnish him vouchers from parties to whom he has made payment.

Take the case of one who is administrator of several estates. He opens an account with a bank as "administrator." He deposits a number of drafts payable to his order as administrator of the several estates, respectively. The bank thus has notice that the fund is a trust fund, and also the sources from which it is derived. If the bank should deal with this fund as the private property of the administrator, it would, according to all authorities, be bound. But if the administrator draws checks, in his official capacity, in favor of third parties, distributees, of one or more of the funds, there is no principle and no authority which would hold the bank responsible for the proper distribution. The bank might, for the convenience of the depositor, note on his pass book the name or number of the case to which each deposit belonged; and the checks drawn, might idicate the case in which the payment was made, but such fact would not impose the duty on the bank to balance the checks and deposits in each case. As long as there were funds on hand to the credit of the "administrator," the bank would be bound to honor the checks.

Such, we venture to say, is the practice and understanding of bankers and business men everywhere, and such is the conclusion of the courts, so far as they have passed upon the subject, as we have already seen.

The rules which govern an account kept by a court, do not differ from those in other cases.

Otis v. *Gross*, 95 Ill. 618.

THE DUTY TO KEEP A SEPARATE ACCOUNT DID NOT ARISE FROM ANY LAW OF THE UNITED STATES.

We place here in juxtaposition all the provisions of the United States Statutes having any bearing upon the question. Rule 28, in bankruptcy, hereinafter quoted, should be and will be considered in connection with these provisions, all of which were in force when said rule was adopted:

"Section 995. All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, and assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court."

"Section 996. No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in, or on account of, which it is drawn."

Here, then, instead of a requirement that money shall be deposited to the credit of, or on account of, the cause from which it is derived, is a positive enactment that it shall be deposited "in the name and to the credit of the court." This necessarily means a general deposit to the credit of the court. It is intended that the money, when deposited, shall be under the control of the court, and, of course, to be withdrawn only upon the order of the court. But there is no intimation that the deposit shall be special, or the authority of the court, on its withdrawal, be limited,

in each case, to the particular fund originating in such case. There could be no necessity for this, if the clerk performs his duty; and the act seeks to enforce that duty by requiring a bond from the clerk, and providing criminal punishment for its violation. (See section 5504, R. S. U. S.)

The only provision in the Revised Statutes in regard to the keeping of separate accounts by depositories, is section 3642, as follows:

"Every depository shall keep his account of the money paid to or deposited with him, *belonging to the post-office department*, separate and distinct from the account kept by him of the public moneys so paid or deposited."

The next section, 3643, is as follows:

"All persons charged by law with the safe keeping, transfer and disbursement of the public moneys, other than those connected with the post-office department, are required to keep an accurate entry of each sum received, and of each payment or transfer."

Congress is here legislating directly upon the manner of keeping the accounts by depositories, and requires separate accounts only as to one class of moneys; as to all others, the requirement simply is that a record shall be kept of each sum deposited and of each payment made. According to the most familiar rules of construction, this is equivalent to a positive enactment, that in all cases other than post-office money, the depository is not required to keep separate accounts, but that his duty is discharged by keeping an account only of the deposits and withdrawals—all of which was done by the depository in this case.

There is no intimation that the depository shall keep a separate account of the sums deposited, except in reference to post-office moneys—in fact, the contrary rule is fairly deducible from these provisions. The law requires the order to state the cause on account of which the sum is drawn. The purpose of this

provision is obvious—that the judge, when he signs the check, may know for what purpose the money is drawn; the check serves as a voucher in the case, and shows what disposition has been made of the money. But the fact that Congress, while thus providing for the manner of *withdrawal* of the funds, is silent as to requiring separate accounts, indicates that the keeping of such separate accounts was not contemplated.

It was never contended that it was necessary, and it never was the practice, under these provisions of the statutes, which have been in force many years, to keep separate accounts. It is claimed, however, that Rule 28, in Bankruptcy, made this necessary,—to which rule attention will next be directed.

THE DUTY TO KEEP SEPARATE ACCOUNTS DID NOT ARISE BECAUSE OF ANYTHING CONTAINED IN RULE 28 IN BANKRUPTCY.

Mr. Justice Harlan, who sat with Judge Treat in the Circuit Court of the United States for the Southern District of Illinois, in the trial of the case of the *St. Louis Rail Fastening Company* v. *State National Bank*—a case founded on substantially the same state of facts as the case at bar—decided the bank to be liable, mainly on his construction of Rule 28.

The following is the substance of his opinion:

"I think the clear meaning of this rule is, the words 'severally on account of any bankrupt's estate,' mean that the officer, when he makes the deposit, must indicate, by the form of the deposit, the account on which he makes it. He would not be complying with the rule to make the deposit generally to the credit of the District Court of the United States. He must indicate, in the form of the deposit, the account on which the deposit is made. If in a bankrupt's estate, he should say, or have it said, upon the books of the bank, or upon the book which he keeps, that it is on account of the bankrupt's estate—A, B, C, D or E. That construction is borne out by the fact that when a check is drawn, it is required by the rule to state the date, sum, and account for which it is drawn. Now, I think that the deposit book is to be

regarded and to be understood as if there was an account kept with each one of these cases in which a deposit is made, as if it read 'The State National Bank of Springfield, Illinois, in account with the United States District Court for the Southern District of Illinois, on account of case 2197, in Bankrupt Court.'"

We have no desire to undervalue the weight that should be attached to an opinion of Justice Harlan; but we submit that, at this stage of the proceedings, his opinion is entitled to consideration only so far as it is supported by reason or authority. As for authority, none whatever is cited. That leaves us to consider what is the true construction of rule 28. The rule is as follows:

RULE 28 IN BANKRUPTCY.

"The District Court in each district shall designate certain National Banks, if there are any within the judicial district, or if there are none, then some other safe depository, in which all moneys received by assignees or paid into court in the course of any proceedings in bankruptcy shall be deposited; and every assignee, and the clerk of said court, shall deposit all sums received by them severally, on account of any bankrupt's estate, in one designated depository, and every clerk shall make a report to the court of the funds received by him, and of deposits made by him, on the first Monday of every month. On the first day of each month, the assignee shall file a report with the register, stating whether any collections, deposits or payments have been made by him during the preceding month, and, if any, he shall state the gross amount of each. The register shall enter such reports upon a book to be kept by him for that purpose, in which a separate account shall be kept with each estate; and he shall also enter therein the amount, the date, and the expressed purpose of each check countersigned by him. No moneys so deposited shall be drawn from such depository unless upon a check or warrant, signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the assignee or the clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this rule shall be furnished to the depository so designated, and also the name of any register authorized to countersign said checks."

The conclusion of Justice Harlan is based wholly on the word "severally," as employed in the rule, in the following clause:

"And every assignee, and the clerk of said court, shall deposit all sums received by them severally, on account of any bankrupt's estate, in one designated depository, and every clerk shall make a report," etc.

Now, notwithstanding the conclusion of Justice Harlan, we submit, with all due deference, that the word "severally" refers to the assignee and the clerk, and not to the manner in which the deposit shall be made. The clause is to be construed as if it read thus:

"Every assignee and the clerk of said court, *severally*, shall deposit all sums received by them on account of any bankrupt estate, in one designated depository."

In other words, as both assignee and clerk had been jointly named, the word "severally" was inserted to show that the duty to be performed was not a *joint* but a *several* duty.

The clause following: "And every clerk shall make report to the court of the funds deposited by him, on the first Monday in each month," is confirmatory of this construction.

The rule, as will be seen, prescribes the duties of the court and its officers regarding the deposit of moneys. It is absolutely silent as to the duty of the depository. It directs the manner of withdrawing the funds deposited, and directs that a copy of the rule shall be furnished the depository. The object of the last provision is, that the bank may know that checks presented are properly signed and drawn.

The Supreme Court of Illinois, in speaking of Rule 28 in the *Reilly case*, sub., say:

"What the rule really means is, that 'every assignee and the clerk' shall deposit all sums received by them respectively

on account of any bankrupt estate in one designated depositary. That is its plain meaning and nothing more. It will be noted also that Rule 28 directs how and in what manner such trust funds may be withdrawn from such designated depositories. In that respect, while it is a little fuller perhaps, it follows closely section 996 of R. S. of U. S. on he same subject, but makes no material change of the mode or manner of withdrawing such funds.

"Holding then, as this court does, that the account was was properly kept as a unit with, and in the name of, 'The District Court of the United States for the Southern District of Illinois," in conformity with the act of Congress and Rule 28 in bankruptcy, and that it was properly withdrawn on checks as directed by the statute, and the said rule for the benefit of beneficiaries entitled to share in the common funds; there was no misappropriation of such funds by the bank, and there is and can be no liability upon the bank for any deficit in the amount due such beneficiaries, arising from the wrongful conduct of the former clerk in omitting to deposit all the trust funds that came to his hands as an officer of the court."

The rule does not, in any manner, change the law, as it is left by the provisions of the Revised Statutes already quoted. It does not attempt to prescribe the duties of the depository, because they are already defined by law. The rule does not require the deposit to be made and kept separately in each case. It does not requ re any reference to be made to any case number, or to the title of any bankrupt estate, in making deposits. Such entries were only made here by the voluntary direction of the clerk, and were, at the same time, accompanied with the instructions to keep the account as a unit.

Rule 28 does require that each check shall be countersigned by the judge or register, and shall show the date, amount, and the account *for* which it was drawn. It also requires that like entries as to all checks drawn should be kept by the clerk or assignee. The checks themselves would operate as receipts, and, taken in connection with the books kept by the officers of the court, would show the condition of each estate at any time.

The rule of the court intended that each check should be a voucher, and show the *purpose* for which it was drawn; but the very form of the checks, as well as the phraseology of rule 28, sufficiently shows that the bank was not expected to keep separate accounts with each estate. Had that been the intention each check would have directed the bank to pay the money named therein, *and charge the same to the particular account.* This would have been the course pursued had the court opened a number of separate accounts with the bank, and the rule would have required each check to state the account *against* which, or *upon* which, it was drawn; but the order only requires each check to state the account for which it was drawn,—in other words, to state the *purpose* for which it was used.

At the risk of being thought prolix, we will again quote the important words of Rule 28.

"No moneys so deposited shall be drawn from such depository unless upon a check or warrant, signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the assignee or the clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate."

The above paragraph contains specific directions to the clerk or assignee, which are equally applicable to the depository, and of which the latter is required to take notice. Every check must state the date, the sum, and the account for which it is drawn.

The remaining directions have specific reference to the duties of the clerk or assignee, with respect to the entries which said officers are required to make in a book to be kept by them.

The rule in question, as well as the statutes, are silent as to any duty on the part of the bank, to credit each sum deposited to any separate bankrupt estate. The requirement is that all deposits shall be to the credit of the court.

Why is it that rule 28 is silent as to keeping separate accounts of the moneys paid into the bank, yet explicit in requiring that all checks shall state the account for which they are drawn?

We think the purpose of the rule very plain, and in strict accordance with that of Sec. 996 of the Revised Statutes, U. S.

If it were intended that a separate account should be kept by the bank with each of the numerous bankrupt cases pending in the court, it would be wholly superfluous to require that each check should specify the account on or against which it was drawn. No money would or could be paid on any check which did not so specify.

If all accounts were to be kept separately, a check which did not specify the account on which it was drawn would not be honored. The purpose of the rule undoubtedly was, that each check, when drawn and paid, should remain as standing evidence in the hands of the clerk or assignee, not only that the bank had paid the amount, but also that it had been paid to a particular creditor in a particular bankrupt case.

It was because the law and the rule in question did *not* require separate accounts to be kept by the bank, with each bankrupt case, that each check was intended to become a voucher, not only as between the court and the bank but between the court and the special creditor who had received the money on account of what was due him from some particular bankrupt case.

This, we assume, was the reason why the rule did not require deposits to be made to the credit of each bankrupt case, but did require that every check should show to whom the money was paid, and on what account. The very words of the rule which indicate what the checks shall contain, fully confirm our view. It is nowhere said that such checks shall be drawn against or upon any separate account, but they must state "the account for which they are drawn." We therefore submit that rule 28, so far from imposing on the bank the duty of keeping a separate account with each bankrupt estate, leads reasonably to the very opposite conclusion.

All persons at all familiar with banking must be well aware that notes and figures in the margin of a check are often placed there by depositors for their own convenience. They are almost always private memoranda by which bank customers preserve special information for their own benefit. Such notes, in the absence of specific directions, do not give notice to the bank that checks bearing particular marks are to be paid only from particular funds. The same is true as to special marks on deposit tickets. If a banker be required to keep particular deposits separate from all others, placed to the credit of the same depostor, it requires something more than marginal hyeroglyphics to impose that duty. He is entitled to plain directions, and cannot in law or practice be misled by the want of specific directions, or by the long continued practice of his depositor.

If, as is claimed by counsel, the bank had equitable notice that it was required to keep a separate and individual account with each particular case by its name and number, let us see to what absurd conditions this would lead.

First of all, the evidence shows that there were at this time in the court nearly 5,000 separate and distinct cases, and at least two of them bore this same number 2105.

Again, the checks in this case show that while the number of the case remained the same, the name of the case did not. One of these checks is drawn "in the matter of Andrew Gundy, bankrupt;" one "in the matter of Abner P. Woodworth, bankrupt;" two "in the matter of Joseph Bailey, bankrupt," and two "in the matter of Hiram Sandford & Co., bankrupts." It appears that those gentlemen were members of the firm of Sandford & Co, and were each individually adjudged bankrupts, but how was the bank to know that fact? It could only know that these checks were drawn in the same case by the number 2105, which was the only mark common to all of them. There was not even reasonable notice to the bank that the checks were all drawn in the same case.

Counsel insist that this number 2105, which was the sole mark of similarity between the checks, was equitable notice to the bank that the money deposited in a particular case must be held for the payment of checks drawn in that case, when the case itself was presented to the bank on these very checks by four separate and distinct titles.

THE ILLINOIS DECISIONS.

THE SUPREME COURT OF ILLINOIS, IN THE REILLY CASE, HAS DECIDED THIS QUESTION IN FAVOR OF THE BANK.

Since this case and the other cases depending upon it were first decided by the United States Circuit Court, a number of suits have have been brought in the State courts, arising on the same state of facts, and growing out of the same shortage

in the accounts of Mr. Bowen. One of these, known as the *Reilly case*, has been carried through all the State courts, and has recently been decided by the Supreme Court of Illinois. When the case of *Reilly* v. *State National Bank* was tried in the Sangamon County Circuit Court, the opinion of Mr. Justice Harlan in the *Rail-Fastening case* had just been made, and the judge of the Circuit Court of Sangamon County deferentially followed that opinion. The Appellate Court for the Third District of Illinois, a tribunal second in importance only to the Supreme Court of the State, reluctantly followed the same decision. We say reluctantly, and that it may be seen that we do not misrepresent the view of the Appellate Court, we print in full the opinion of that court, which is very brief, as showing that the court simply accepted the ruling of the United States Circuit Court in the construction of federal statutes and rules "until set aside." The *Italics* are ours:

THE APPELLATE COURT DECISION.

STATE OF ILLINOIS—APPELLATE COURT, THIRD DISTRICT.

May Term, 1886.

STATE NATIONAL BANK *vs.* REILLY.

Per Curiam.—The question presented here is as to the liability of a National Bank upon a check drawn by the United States District Court in favor of the plaintiff for a dividend in Bankruptcy. The judgment of the trial court was for the plaintiff. It is unnecessary to state the facts in detail.

"The bank was a designated depository of the District Court, and the judgment rests upon a *supposed special duty* growing out of the relation of the bank to the court. *If the bank and the court occupy the common relation obtaining between banker and depositor, we should readily say there is no liability upon the facts disclosed by the record.* This depends, however, upon the construction to be given certain Federal Statutes and rules in Bankruptcy.

"We understand from the briefs that the question has been determined by the United States Circuit Court against the Bank, and is now pending on appeal from that decision in the Supreme Court of the United States.

"Conceding the jurisdiction of the Federal Courts to construe the statute and rules involved—and therefore settle the point in dispute—we are disposed to accept that ruling as authority *until set aside*—and affirm the judgment. Affirmed"

The case above alluded to by the Appellate Court as pending in the Supreme Court of the United States, was the cause entitled *The State National Bank* v. *St. Louis Rail-Fastening Co.*, which came to this court upon a certificate of division signed by Judges Harlan and Treat, in October, 1883. While it was pending here, the case of *State National Bank* v. *Reilly* was appealed to the Supreme Court of Illinois, and that court continued it from term to term, awaiting the decision of the *Rail-Fastening case* by this court. About April, 1887, the *Rail-Fastening case* was dismissed by this court, without any consideration of the merits, upon the ground that the certificate of division did not conform to the rules of the Court.

On the 9th of November, 1887, the Supreme Court of Illinois delivered its opinion in the *Reilly case*, reversing the decision of the Circuit and Appellate Courts.

This opinion being as yet unreported, we deem it of such importance that we give place to it here in full, and we call the attention of the court to the utterance of the Supreme Judicial body of the State of Illinois, in a case arising upon the same state of facts as the case at bar.

James Reilly, like Dodge, the defendant in error, was one of the creditors of Hiram Sandford & Co., and the check presented by him and upon which payment was refused, differed only in date and amount from the checks in controversy. The cause was tried

upon a stipulation of facts substantially the same as made in this case. It was exhaustively argued, both orally and by brief, by the same counsel now appearing for the defendant in error, and after the thorough consideration which the case received, the decision of the Court is entitled to all the weight which can attach to it as the utterance of the high judicial body from which it emanates.

THE SUPREME COURT DECISION.

STATE OF ILLINOIS—SUPREME COURT, CENTRAL GRAND DIVISION.

THE STATE NATIONAL BANK,
Appellant,

VS.

JAMES REILLY,
Appellee.

"SCOTT, J.—This suit was brought by James Reilly against the State National Bank, on a dividend warrant or check drawn by the clerk of the District Court of the United States for the Southern District of Illinois, on a fund deposited to the credit of that court, by the present clerk and his predecessor, with the defendant bank for the sum of $221.17. The check is countersigned by the judge of that court, and is an absolute order to pay that sum of money to plaintiff. It is in the usual form of a bank check, drawn upon the general fund of the drawer, without specifying any particular fund out of which it is payable, and differs from such check only in the fact, it has on the face of it some marginal memoranda and also some in the body of the check, to both of which reference will be made further on. The facts out of which this litigation arises appear either from the stipulation of the parties or are so fully proven that no controversy exists as to them. At the trial defendant submitted several propositions to be held as law applicable to the case, which the court refused, and that ruling of the court is assigned for error. As the first of the series of propositions submitted, if correct, is conclusive of the whole cause, it will not be necessary to notice or comment on the others. It is, 'that the law is, upon the facts in evidence, that the

plaintiff is not entitled to recover.' Section 995, of the Revised Statutes of the United States, provides: 'All moneys paid into any court of the United States or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, and assistant or a designated depository of the United States, in the name, and to the credit of such court.' Conforming to this act of Congress, what is called Rule 28, in bankruptcy, provides among other things, that, 'the District Court in each district shall designate certain National Banks, if there are any within the judicial district, or if there are none, then some other safe depository, in which all moneys received by assignees or paid into court in the course of any proceedings in bankruptcy shall be deposited; and every assignee, and the clerk of said court, shall deposit all sums received by them severally, on account of any bankrupt's estate in one designated depository, and every clerk shall make a report to the court of the funds received by him and of deposits made by him, on the first Monday of every month.'

"The rule makes it the duty of assignees to make certain report to registers in bankruptcy, and defines the duty of such registers, and then further declares 'no money so deposited shall be drawn from such depository unless upon a check or warrant signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn.'

"There is no doubt it was in compliance with the act of Congress cited, and the rule in bankruptcy on the same subject, that about the first of March, 1873, the defendant bank was designated a depository for the 'United States District Court for the Southern District of Illinois.' Shortly thereafter George P. Bowen, since deceased, then clerk of such court, made the first deposit of funds belonging to the registry of the court with the defendant bank, and the bank then by his direction opened an account with the 'United States District Court for the Southern District of Illinois,' and entered such deposit to the credit of that court. The clerk continued to make deposits of funds belonging to the registry of the court with the bank up to the time of his death, which occurred in February, 1880, and the bank continued to enter such deposits to the credit of the court in the manner directed by the clerk making the same. At first, 'each deposit so made by the clerk was by the bank entered on its books, and in the deposit book of the clerk, to the credit of the particular case, naming the case, with the number to which the funds so deposited belonged; that afterwards, by direction of the clerk, all deposits so made were entered by the bank in the name of 'The United States District Court for the Southern District of Illinois,' dropping the name but retaining the number of the case, as for example,

'1876, January 21, to Dep. 1687, $5,200.00.' It is admitted the bank understood when these entries were made the number on either side of the account referred to the case in which the deposit in the first place was made, and in which the check in the second place was drawn. The evidence shows, and indeed the admission goes that far, that the bank always treated the account as an entirety and paid out of it all checks drawn by the clerk and countersigned by the judge, until the deposits were exhausted. This mode of keeping the account and making payments out of it seem to have been acquiesced in by the court and its principal officer, the clerk, under whose directions the deposits were made, for it is admitted that between the time of the first deposit, in March, 1873, and the death of Bowen in 1880, the bank balanced the account with the court nine different times; returning all checks to the clerk at each balancing and entering the case number and amount of each check so returned in the depositors' book. That is the usual course when a depositor draws on his funds in bank as an entirety, and had this not been in conformity with the act of Congress and Rule 28 in bankruptcy on the same subject, it is hardly probable the court would have permitted its account to be be kept in that way, and payments to be made out of it as was done through so many years, without interposing some objections or requiring it to be kept otherwise. It does not appear any objection was ever made to that mode of treating the account, and it seems but reasonable to conclude it was satisfactory to the court.

"The check in suit was given to plaintiff for a dividend due him from the bankrupt estate of H. Sandford & Co. The case was numbered 2105. Prior to his death, Bowen had made large deposits with defendant of funds derived from that estate, and after his death his suceessor in office made quite large deposits of funds received from the same estate in precisely the same way Bowen had been accustomed to do. It appears that of the funds deposited as having been received in case number 2105, after deducting all checks drawn for dividends in that particular case, including the check in suit, there would remain a considerable balance to the credit of that case, if the same had not previously been paid out on checks drawn by the clerk and countersigned by the judge of the court. The difficulty arises out of the admitted fact that the former clerk failed to deposit all the funds that came to his hands belonging to the registry of the court. Had he done so there would of course have been enough in the bank with which to pay all checks drawn upon the funds of the court. Payment of the check in suit was refused because the bank, prior to its date, which is May 12, 1881, had actually paid out on checks similar to this one, signed by the clerk and countersigned by the judge, and differing as to the number of the case, names, dates, and

amounts, all funds ever deposited with it to the credit of the court, either by Bowen or his successor in office.

The principle upon which plaintiff seeks to recover, is that the bank had notice by the manner of receiving and keeping the account, and the form of the checks, that the moneys deposited as having been received from number 2105, could only be paid to persons presenting checks cantaining that number, and that making payments otherwise was a misappropriation of such funds in its possession. The position assumed does not, in the opinion of this court, seem to be warranted by either the facts or the law. That the deposits made by the respective clerks of the court were trust funds, and were known to the bank to be such at the time the deposits were made, will be conceded and taken for granted in all the further of consideration the case. It then becomes a question of law what duty the bank owed to the beneficiaries in regard to such funds. A depository of trust funds, whether a corporation or an individual, may not divert such funds from the beneficiaries for private debts or otherwise, and the beneficiaries could, no doubt, compel such trustees to preserve such funds for their benefit. The law, in respect to the duties of trustees, in regard to trust funds committed to them, is so well understood, no discussion of that branch of the law is deemed necessary. It is proper, however, to bear constantly in mind the fact the depository or trustee in this instance is a banking corporation, and that the trust funds were placed in its custody for the purpose of being checked out by the depositor for the use of the beneficiaries entitled to the same. The law on this branch of the case is well expressed in the opinion of the court in the *National Bank* v. *Insurance Company*, 104 U. S. 44, where it is said: 'A bank account, it is true, even when it is a trust fund and designated as such by being kept in the name of the depositor as *trustee*, differs from other trust funds which are permanently invested for the sake of being held as such; for a bank account is made to be checked against and represents a series of current transactions. The contract between the bank and the depositor is that the former will pay according to the checks of the latter, and when drawn in proper form the bank is bound to presume that the trusstee is in the course of lawfully performing his duty and to honor them accordingly.' Certainly a bank may properly make payments on checks of the person whose deposits it holds until notice of some adverse claim. Otherwise there would be no safety for a corporation transacting a banking business with its customers. Applying these familiar principles, which accord with the common understanding of the manner in which banking business is usually transacted, the case in hand will present no serious difficulty. It will be seen the account was kept by the bank in exact conformity with the act of Congress, Section 995, *ut supra*, that is, it was kept as a unit in the name of the court, requiring funds coming under its control to be deposited. No one can insist with any show of reason that this section of the United States Statute made it the duty of the court to cause

its depository to keep a separate account with each case pending, or that had been adjusted from which the deposits may have been received by the court or its officers. That is the appropriate work of the officers of the court under its direct supervision. All the statute requires of the depository, is that it safely keep all trust funds intrusted to its custody by the court or its officers, and pay out the same on the checks or orders of the court, through its proper officers. Further than that the statute imposes no duty or obligation upon these designated depositories of the funds being administered under the direction of the United States Courts, nor is it correct to say that Rule 28, in Bankruptcy, has enlarged the duties imposed by the act of Congress upon the depository in this case, or placed it under different or other obligations in respect to the keeping of the account of funds intrusted to it by the court, under whose appointment it was acting. This rule was no doubt adopted with the view to point out more specifically the duties of certain officers of the court, in respect to funds belonging to, or in the custody of, the court, but when subjected to a close study it will be seen it adds nothing of any value to the statute on the same subject. As has been seen, the act of Congress required all moneys paid into any court of the United States or received by the officers thereof, to be forthwith deposited in a designated depository of the United States 'in the name and to the credit of the court.' Rule 28 requires the same thing in regard to such funds, and nothing more. The insistance in argument seems to be that the phrase in rule 28, 'every assignee and the clerk of said court shall deposit all sums received by them, severally, on account of any bankrupt's estate in one designated depository,' requires that the account in the bank should be kept with each bankrupt estate and not as a unit with the court. This does not seem to be a correct reading of the rule. It might be suggested the word "severally," as used in that connection, is not happily selected. Its meaning, as usually defined is, 'Distinctly,' 'Separately,' 'Apart from others.' Understanding the word *severally* in either sense, how are assignees and clerks to make deposits of funds coming to them in their official capacity? Obviously it was to be done 'Separately' and 'Apart from others.' What the rule really means is, that 'every assignee and the clerk' shall deposit all sums received by them respectively on account of any bankrupt estate in one designated depository. That is its plain meaning, and nothing more. It will be noted also that rule 28 directs how and in what manner such trust funds may be withdrawn from such designated depositories. In that respect, while it is a little fuller, perhaps, it fellows closely section 996 of Revised Statutes of United States on the same subject, but makes no material change of the mode or manner of withdrawing such funds.

"Holding, then, as this court does, that the account was properly kept as a unit with, and in the name of, 'The District

Court of the United States for the Southern District of Illinois,' in conformity with the act of Congress and rule 28 in bankruptcy, and that it was properly withdrawn on checks drawn as directed by the statute, and the said rule for the benefit of beneficiaries entitled to share in the common funds, there was no misappropriation of such funds by the bank, and there is, and can be no liability upon the bank for any deficit in the amount due such beneficiaries, arising from the wrongful conduct of the former clerk in omitting to deposit all the trust funds that came to his hands as an officer of the court.

"This view would seem to be conclusive of the whole case and to render further discussion unnecessary, but as great stress is laid on the fact that certain memoranda appear on the face of all checks drawn against the funds in the hands of the bank, that phase of the case will briefly be remarked upon. Over the check was written or printed 'In the District Court of the United States for the Southern District of Illinois.' 'Check No. 53,' 'Case No. 2105.' 'In the matter of H. Sandford & Company, bankrupts.' In the body of the check it is said, the sum directed to be paid to plaintiff 'being in full for the dividend of 7-10 per cent. declared April 30, 1881, on his claim for $31,380.00, proved against said bankrupt estate.' No doubt the check was drawn in this form, for the reason the statute requires that 'every such order shall state the cause in or on account of which it is drawn'. Rule 28 in substance requires the same thing. It can not be known certainly why it was made necessary, every such order should contain these things, or this particular information. Many reasons might be suggested why it should be so. First: It was an assurance from the court to the bank that the trust funds in its custody were being withdrawn for the use of beneficiaries and were therefore not being misappropriated. Second: It might be of advantage to the court and its officers in making up the accounts with each estate in bankruptcy pending, or that had been adjudicated in the court; and third: It would be a convenient mode of obtaining vouchers from the parties receiving dividends that would operate as a protection to the officers making such payments. What reason may have existed for so providing by statute, and by rule, matters little. It is only important, it is declared, the check or orders for withdrawing such funds shall contain the things enumerated. Without looking for a reason why it is so, the only concern is what such memoranda indicated, or what obligation, if any there was, thereby imposed upon the bank. Beyond what has already been said, that it was an assurance from the court itself, the funds were being withdrawn for a legitimate purpose, it is not perceived the memoranda either on the margin or in the body of the check contained anything for the guidance or information of the bank in any manner whatever, nor was the bank under any legal duty to observe such memoranda. The

bank could not know, nor was it important it should know, that 'H. Sandford and Company' were the bankrupts whose estate was being administered in 'Case No. 2105,' nor that the payee of the check was a credit of such bankrupt, nor that the sum ordered to be paid him was in full of a dividend declared at a certain date and was a certain per cent. of his claim allowed against the estate of such bankrupts. These were matters exclusively within the knowledge of the court and its officers, and with which the bank had no rightful authority to intermeddle. It is well known, and the testimony is full to that point, the practice among banks paying checks of their depositors is not to observe memoranda upon such checks, but the custom is to regard them as having been made for the convenience of the drawers, and the practice in that regard, it is thought, has the sanction of the law in its support.

"The judgments of the Appellate and Circuit Courts will be reversed, and the cause remanded to the Circuit Court."

"*Judgment Reversed.*"

"SHOPE and MAGRUDER, J. J. We do not concur in this decision."

CONCLUSION.

Congress has passed laws upon this subject of the keeping of accounts by depositories, and the bankrupt court has made rules concerning the same thing. In none of these provisions at least is it required *in terms* that the account of moneys belonging to the several estates shall be kept separate. It is only provided that the deposit shall be in the name and to the credit of the court. Why should a matter of such importance, if it was required as claimed, be left to inference? Why do none of these provisions, which purport to embrace the whole subject, say, *in terms*, that accounts shall be so kept? The depository is an officer of the court, charged with important duties and trusts. It is not usual to leave the duties of such officers to doubt or inference. If it was intended to make the depository an instrument for controlling the court in the distribution of the fund, to keep the accounts separate of the moneys in each of the thousands of cases

in which deposits were made, and require it to refuse the payment of drafts drawn in proper form against the fund to the credit of the court, when, upon examination, it found no money to the credit of the case in which the draft was drawn, why was the law left in such a state as to cause the bank, while honestly attempting to perform its duty according to the most obvious construction of the laws, according to the best judgment of experienced business men, and in direct pursuance of the directions of the officer of the court, *to become the scapegoat for the defalcation of the officer.*

We say, with confidence, that the law never intended such a result. That the law does clearly define the duties of the depository, which are to keep the money safely, and to keep an accurate record of the sums deposited and withdrawn, and to keep a separate account of postoffice money. Beyond these no duties are prescribed, and they are sufficient to answer every purpose for which a depository is created. If the law had required more, it would have said so, and so plainly that no mistake could have occurred, that the depository might have known in the beginning what its duties were. The fact that the law has made no such provision, is conclusive evidence, in our minds, that no such requirement was contemplated. In fact, the provisions on the subject amount in effect to positive enactment to the contrary.

We have now examined every source from which the alleged duty on the part of the bank could arise. We have found that the account was kept in strict accordance with the directions of the officer making the deposit, and that on repeated settlements of the account with the court, the course pursued was ratified and approved. We have found that the natural and obvious use of the memoranda was for the convenience of the court and its officers,

and that from such memoranda the bank could have had no notice of the defalcation of the clerk, or the diversion of the funds. The account being kept as a unit precluded such notice. Even if the bank could have ascertained the fact from the memoranda, it was still bound to honor the checks of the court,—it was bound to presume that the court was in the proper performance of its duties. So long as the bank did not participate in a diversion of the trust money to the private purposes of the trustee, it could not be liable upon the principle of any decided case. We have found that the memoranda were accompanied with directions to keep the account as a unit, and the duty to keep a separate account could therefore not have arisen from the manner in which the account was directed to be kept, or from the memoranda.

We have found that the statutes and rules of the court, so far from specifically requiring the keeping of separate accounts, by direct implication provide to the contrary, and we find the Supreme Court of the State of Illinois in full accord with the views held by us on every question presented by this record.

Let the responsibility for the loss fall where it belongs—not upon the parties who have faithfully performed their duty according to the plain construction of the law, and according to the course of long established usage among business men, but upon one whose criminal misfeasance caused the loss. There should be no contention among the beneficiaries of the court as to *which* of them should be paid from the money left with the court for them. Because the money taken from the treasury of the the court happened to be derived from some particular source, is no reason why the court should compel the parties for whom that money was intended to bear the whole loss. The law required the

clerk to give security for his conduct. Let his sureties make good the loss, so that all can be paid alike. If they are sued, no question can arise as to the breach of duty. It will not be necessary to resort to inference or tortured constructions of the law to fix their liability.

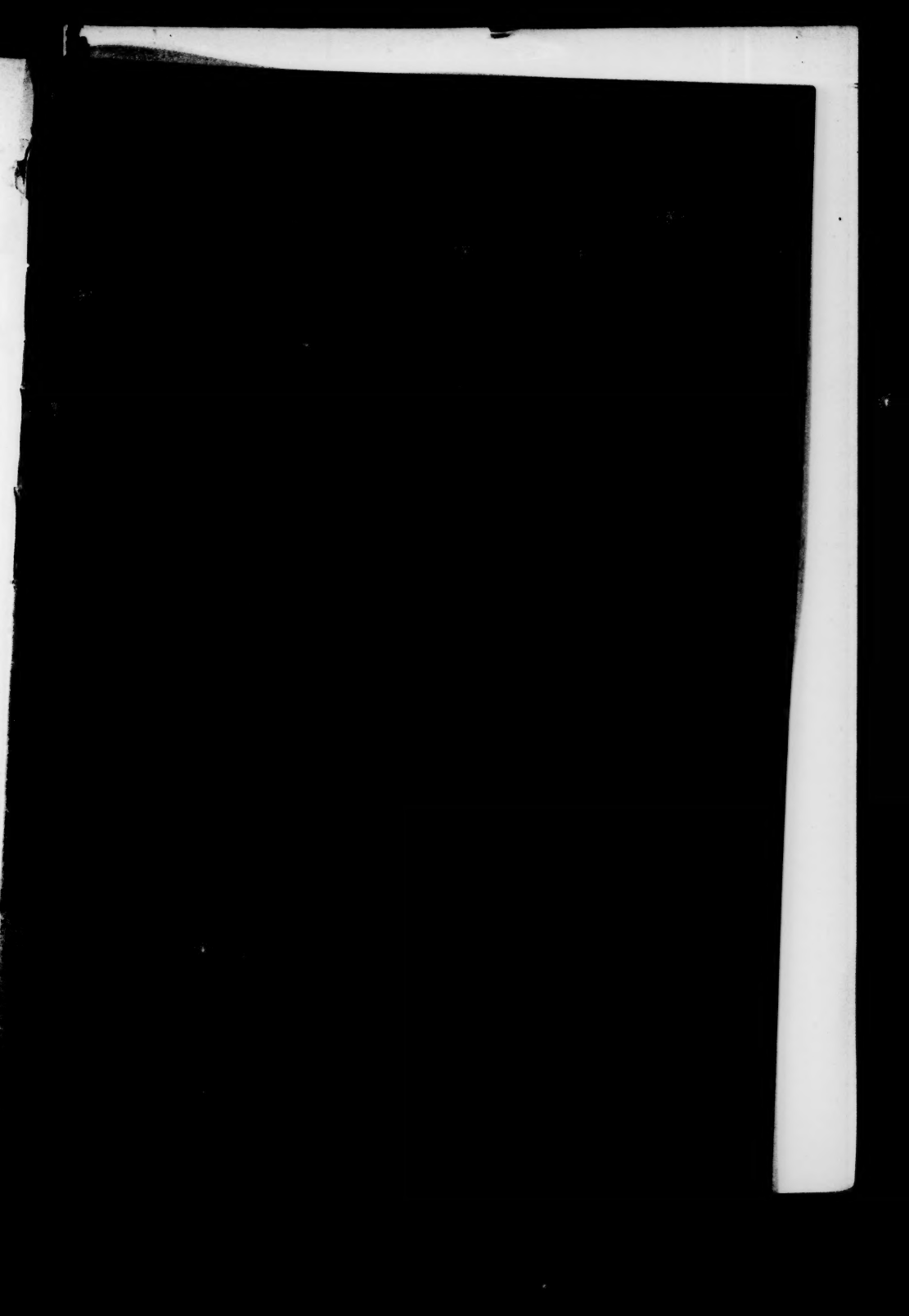
The law did not require the keeping of separate accounts, because it was never contemplated that a part of the beneficiaries of the court should be paid and others lose their money. Safeguards were provided to secure the deposit of the money in the first instance to the credit of the court,—bonds required, penalties provided, and monthly reports to the court enjoined. Safeguards were provided to prevent the withdrawal of the funds for any but trust purposes, by requiring each draft to state the account for which it was drawn, and to be signed by the court. These provisions were sufficient, if enforced, to secure every beneficiary of the court his due, and we repeat, it was never in the contemplation of the law that a contest should arise among the beneficiaries of the court as to *which* of them should be paid.

We beg pardon of the court for presenting a brief much longer than it is our custom to make, but the importance of the case would seem to justify it, and we submit the matter with confidence that your Honors will, upon due consideration, reverse the finding of the Circuit Court.

Respectfully submitted,

MILTON HAY,
HENRY S. GREENE,
Counsel for Plaintiff in Error.

SPRINGFIELD, ILLINOIS, Dec. 20, 1887.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1887.

THE STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS.
Plaintiff in Error.

vs.

JOHN L. DODGE,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

GEORGE HUNT, *Attorney.*

During the operation of the bankrupt law, the firm of H. Sandford & Company, and the several individual members of said firm were adjudged bankrupts in the United States District Court for the Southern District of Illinois. Plaintiff in Error was appointed depository for the United States District Court for the Southern District of Illinois, about March 1, 1873. On March 4, 1873, George P. Bowen, then clerk of the District Court, made the

first deposit of the funds belonging in the registry of said court with said bank, and the bank then, by direction of Clerk Bowen, opened an account with "The United States District Court for the Southern District of Illinois," and entered said deposit to the credit of said court, and each deposit so made by the clerk was by the bank entered on its book and on the deposit book of the clerk to the credit of the particular case, naming the case, with the number of the case to which the funds so deposited belonged. Afterward, by direction of the clerk, all deposits so made were entered by the bank in the name of "The United States District Court for the Southern District of Illinois, "dropping the name, but retaining the number, of the case. Said clerk continued to make deposit of funds belonging to the registry of said court with said bank up to the date of his death, which occurred February 2, 1880, and the bank continued to enter such deposits to the credit of the court in the manner directed by the clerk. These entries of deposits were made by the bank by the direction of the clerk, both on the books of the bank and on the deposit book retained by the clerk, in the following manner:

"1873. Mar. 4. To Dep. 1971—$1,075.00"
"1874. Jan. 30. " 1425— 225.00"
"1875. Jan. 11. " 1590— 4,619.00"
"1876. Jan. 24. " 1637— 5,200.00"

At the time each deposit was made the clerk brought to the bank the money to be deposited together with his depositor's book, and a ticket, which would be like the following, differing only as to number, date and amount:

"STATE NATIONAL BANK,
"Springfield, Illinois, Mar. 4, 1873.
DEPOSITED BY GEORGE P. BOWEN, CLERK.
"Current funds—No. 1971.....$1,075.00"

Thereupon the cashier of the bank would receive the funds and the ticket and enter in the clerk's deposit book as well as in the books of the bank under the account with "The District Court of the United States for the Southern District of Illinois" as follows:

"1873. Mar. 4. To Dep. 1971—$1,075.00"

It was admitted on the trial and is so found by the court that when these deposits were made, the bank understood that the numbers on either side of the account, as "1971" above, referred to the case in which the deposit in the first place was made and in which the check, in the second place, was drawn. Whenever a check or order was drawn by the court in favor of a distributee in a bankrupt estate, it was in the following form:

Check No.—. } IN THE DISTRICT CNURT OF THE UNITED STATES. { *Case No.*——
For the Southern District of Illinois.

In the matter of .....Bankrupt

Springfield, Ill......188..

The State National Bank,

U. S. DEPOSITORY.

Pay to the order of.....

.....DOLLARS.

being in full for the dividend of.....per cent. declared.....188..

on.....claim for .....dollars proven against said Bankrupt estate.

$.....

.....CLERK.

Countersigned:

.....*Judge.*

The blanks being filled out with the number of the case, the name of the distributee, the name of the bankrupt, the per cent. and date of the dividend, and the amount of the claim, the number of the case as stated in the order or check being the same as the number on the deposit ticket made by the clerk, and on the books of the bank and the deposit book of the clerk, as entered by the officers of the bank at the time the deposit was made.

The case of H. Sandford & Company, bankrupts, and of the several individual members thereof was numbered 2105. Of this firm Hiram Sandford, Andrew Gundy, Joseph Bailey and Abner P. Woodworth were members, and all were individually adjudged bankrupts in said case. After said firm and the members thereof were adjudged bankrupts in said court and prior to the commencement of this suit, deposits were made in said bank of funds belonging to said estate, amounting to $38,300 in the following order:

"1879.	July 25.	To Dep.	2105—	$17,000"
	Aug. 7.	"	2105—	5,000"
"1880.	Jan. 10.	"	2105—	4,000"
	Oct. 14.	"	2105—	10,000"
	Nov. 12.	"	2105—	2,000"
"1881.	Feb. 25.	"	2105—	3,300"

The funds belonging to said case and deposited in said bank amounting to $38,300, as shown by said account, were sufficient to pay all the checks drawn thereon, including the checks in controversy in this suit, amounting to $33,356.19, still leaving an undistributed balance in said bank belonging to said estate of $4,943.81.

This suit is one of a series of four of like character brought on unpaid checks drawn in case No. 2105, in the United States Circuit Court for the Southern District of Illinois, which were tried at the June Term of said court, 1882, in which judgments were rendered for the plaintiffs therein. At that time a certificate of division was made by which one of said causes was to be taken to the United States Supreme Court for decision; the other causes, as it was understood, were to abide the result of the decision in that case. At the time of making said certificate of division it was understood that the case brought to this court entitled "*The State National Bank of Springfield, Illinois*, v. *The St.*

Louis Rail-Fastening Company" should be submitted under the twentieth rule of this court in order that a speedy decision might be had. This, however, was not done, and said cause was only disposed of at the last term of this court by being dismissed on account of want of compliance with the rules of court in presenting the questions to be passed upon.

At the June Term, 1887, of the United States Circuit Court for the Southern District of Illinois, the motions for new trials which had been pending in the others of said causes in said court were allowed and new trials had, and judgments entered respectively for plaintiffs as before, from which a certificate of division is brought again to this court in this case.

It is claimed by plaintiff in error, and so found by the court, that before the presentation of the checks in controversy, the bank had actually paid off on checks similar to those in this case, and differing only as to the number of the case, names, dates, and amounts, all the funds on deposit with it to the credit of the court, it being at the same time admitted by the bank and so found by the court, that many of such checks were drawn as indicated therein in cases in which no deposits had been made by the clerk. From this it is claimed that the clerk had failed to deposit in this bank, money received by him from different bankrupt estates, and that when dividends were made in the estates from which the bank had received no deposits, checks bearing the numbers of such cases were drawn upon the bank by the clerk and were paid. The bank now claims that such payment was made out of the funds in its custody and embraced in the account with "The United States District Court for the Southern District of Illinois." Upon the facts as found by the court on

the trial of this case, eight questions of law are presented for determination by this court, in order to fix the liability of plaintiff in error, or release it from liability.

First. Was it the duty of plaintiff in error to keep a separate account in each case in bankruptcy in which deposits were made in the bank?

We have not yet seen the brief and argument of plaintiffs in error in this case. In the case of *The State National Bank* v. *St. Louis Rail-Fastening Company, supra,* and in a like case, *The State National Bank* v. *Reilly,* in the Supreme Court in the State of Illinois, to which reference will be made hereafter, counsel for plaintiffs in error seem to regard the manner in which the bank kept its books as the vital fact in the case. In the beginning of the discussion, therefore, we desire to say that we regard *the manner in which the bank kept its books as wholly immaterial in fixing its liability, except in so far as the manner in which it kept its books may throw light upon the fact of notice.* The keeping of its books was a matter wholly within its own control, under the direction of its own officers, and could be controlled by no one else. The important question to be determined, upon the answer to which, as we insist, will depend the liability of the bank, is, did the bank have notice of the estate to which any deposit belonged? If it did, then its liability is fixed, and the fact that it may have kept its books by one system or another can not relieve it of that responsibility; neither could the fact, that some one outside the bank might have directed the bank to keep its books in such manner as would ignore that notice, divest the bank of the responsibility which would attach to actual notice; that actual notice was given at the time of each and every deposit is clearly shown, uncontroverted, and specifically found by the court as a fact.

The second finding of facts by the court shows that the bank "by direction of clerk Bowen" opened an account with "The United States District Court for the Southern District of Illinois," and entered said deposit to the credit of said court, and that each deposit so made by the clerk was by the bank entered on its book and on the deposit book of the clerk, to the credit of a particular case, naming the case, with the number, to which the funds so deposited belonged; that afterward, by direction of the clerk, all deposits so made were entered by the bank in the name of "The United States District Court for the Southern District of Illinois," dropping the name but retaining the number of the case, as hereinafter specifically set forth.

It can not be denied that when these entries were made by the bank at the time the account was first opened, the bank knew to what particular case each deposit belonged; that it had such notice as would make it responsible for a wrongful payment of that fund. The deposit was made and entered on the general account with "The United States District Court for the Southern District of Illinois," but "to the credit of the particular case, naming the case, with the number, to which the funds so deposited belonged." Was this form so changed as to affect the character of the notice? The form of the general account was not changed at all. It still remained under the same heading, namely: "The United States District Court for the Southern District of Illlnois," only dropping the name of the case but retaining its number as before. By the fifth finding of facts it is established "That the bank understood when these entries were made that the numbers on either side of the account, as No 1971 above, referred to the case in which the deposit in the first place was made, and in which the check in the second place was drawn." This we submit is conclusive of the fact that the bank

had, *after the form of the account had been changed, just as much and just as sufficieat and complete notice of the character of each deposit and the particular estate to which it belonged as it had before the change in the form of its account.* If, by any means, the bank was made aware at the time a deposit was made, or while the deposit was in its custody, of the nature of the deposit and the estate to which it belonged, it matters not whether that means was the name of the case, the number which it bore on the docket, or any other form of intelligence from which it might by proper care ascertain that fact. Practically, as shown by the second finding of facts, the bank did keep on its own books separate accounts with such individual estates. It is true all the items were entered under one general heading, but each deposit entered on its books, showed the particular estate to which it belonged, and it was thus made as much a separate account by this notice which the bank had constantly before it, as though it had been under another heading on a separate page of the books of the bank.

But it is claimed by counsel that the officers of the bank had no discretion as to the manner in which this account should be kept. This we directly and nnqualifiedly deny. There is no finding of facts in this record which shows that the court ever gave any direction as to how this account should be kept. It is found that the bank had been appointed a United States Depository. The officers of the bank knew that these funds came from the registry of the court. They received the deposits from the clerk. They opened the account with the court by direction of the clerk. They changed its form but not its essential character by direction of the clerk, not by direction of the court, and we deny that the clerk of the court, as such, had any power to direct

the manner in which they should keep accounts on their books so as to absolve the bank from the liability which notice of the nature of a deposit would fix. The excuse, therefore, that the bank was not at liberty to keep its accounts as it chose, has no foundation in law, or anything which appears in this record.

Second. Was it the duty of plaintiff in error to refuse any check drawn in the name of the court and countersigned by the judge thereof unless such check specified the case in bankruptcy on account of which the same was drawn and there were funds in the bank to the credit of such cause?

It would seem that this question needs little discussion. The first finding of facts shows the bank knew to what particular estate each deposit belonged; then by reference to its books it readily knew whether any funds were in its custody belonging to the estate represented by any check presented at its counter. If it knew this, then what right had it to pay a check presented which was drawn in favor of a distributee in an estate, which estate had no credit on its books? It had notice of the estates to which the funds in its custody belonged, and it had notice, also, that the estate named in the check had no funds in its custody. Could the court by any order which it might make, compel the bank by this means to use funds which it knew belonged to a particular estate in the payment of the beneficiaries of another estate? That the court, in the management of these funds, was grossly negligent, we are compelled to admit, but that the late judge of said court ever intended when he countersigned one of these checks, that there should be such a misappropriation of trust funds, as the argument of plaintiff in error imputes to him, will not be believed by any one who knew him. Whatever may have been the intention of the court in countersigning the check, we

deny that his order would justify the depository in the misappropriation of funds in its custody, when it knew, as in this case, that such misappropriation was being made. But this second question, it seems to us, may be conclusively answered by changing the facts which exist in this case. Let us suppose that when these checks were presented at the counter of the bank, the bank had answered truthfully that no funds belonging to the estate of H. Sandford & Company, or to case No. 2105 had ever been deposited with it by the clerk of the court or anyone else; can it be doubted for a moment by any one that that would have been a complete defense to this suit? Is there any court in the land which would have given judgment against the bank on that showing of facts and compelled it to pay, either out of its own funds, or out of trust funds belonging to other estates, checks drawn in favor of an estate to which the bank owed nothing, and of whose funds it had never had the custody? If we could not recover against the bank on such a state of facts, then, such a state of facts will not justify the bank in a misappropriation of funds belonging, under the bankrupt law, to the creditors of the estate of H. Sandford & Company.

Third. Did the failure of the bank to keep such separate accounts or its action in paying out all the funds deposited to the credit of the court on checks drawn generally, leaving no funds to meet the checks in controversy, render the bank liable in this action?

The first suggestion which we make concerning this inquiry is, that there were no "checks drawn generally." The findings of fact Nos. 5 and 8 show that all checks were drawn specifically. While it is not stated in the check out of what particular fund the check should be paid, the name of the bankrupt and the

number of the case were given in the check, and the payment is "for the dividend declared on a claim proven against said bankrupt estate." It is not found that any check was ever presented or paid by the bank which was not thus specific in the notice which it afforded. It is found—No. 5—that the bank understood that these numbers "referred to the case in which the deposit in the first place was made, and in which the check in the second place was drawn." All that remains of this question, therefore, would seem to be this: If the bank had notice of the estate to which any particular fund belonged, and failed to keep such fund for the payment of checks in favor of the beneficiaries of such estate, is the bank liable? To this question there would seem to be but one answer: How could the liability of the bank be more definitely fixed?

Fourth. Did the fact that the defendant bank paid out and exhausted all the funds placed to the credit of the court on checks, some of which did not bear the number of any case from which funds had been derived, render the defendant liable on the checks in controversy, when, if separate accounts had been kept with each case or number, there would have been funds to the credit of case No. 2105 sufficient to satisfy said checks?

As by the finding of facts it conclusively appears in this record that the bank had notice of the estate to which each deposit belonged when the deposit was made, and as is also found, the books of the bank show this notice continually; we insist that it was the duty of the bank whenever a check was drawn for a beneficiary of an estate, which estate had no funds in the depository of the bank, to refuse the payment of such check. If this was its duty, then the fact that it chose to pay such check is no defense when it comes into court and sets up such payment as the means

by which all the funds in its depository have been exhausted and thereby it has become unable to produce the funds belonging to case No. 2105 when the beneficiaries of said estate in proper form demand what belongs to them and what the bank should have in its custody for their benefit. It is not so much the question of "separate accounts" as of the observance of the notice which it is conclusively shown the bank had. It is beyond dispute that sufficient funds were deposited with said bank in case No. 2105 to pay all the checks which had ever been drawn in said case, and that the bank at the time of such deposits knew that the funds belonged to said case. This being true, it was not only gross negligence on the part of the bank to pay out those funds on checks drawn in other cases, but it was gross disregard of the rights of the creditors of this estate. The negligence which this record shows was not all on the part of the court. The bank knew that these were trust funds, and knew their specific and separate nature. If a check drawn by the clerk was presented in favor of a distributee in an estate which had no funds on deposit, the bank instantly from its own books had notice of that fact. It was thereupon its duty to call the attention of the clerk or the court, if necessary, to the fact that by such check an attempt was made to misappropriate funds which belonged to certain estates. Had this fact ever been brought by the bank, as it should have been, to the attention of the judge, there is no one who doubts that he would have instantly corrected the wrong, and would have taken proper steps to prevent its attempted repetition. This the bank failed to do and in so failing, we maintain, was guilty of such negligence that, where, as in this case, the loss must be sustained by one of two parties, definitely fixes the bank as the proper party to sustain that loss. Instead of at any time

so notifying the court that the funds in its possession, made sacred by law, to the use of the creditors of the estates to which they respectively belonged were being misappropriated by the act of the clerk under the formal sanction of the court, it continued for years negligently permitting such misappropriation of funds to be made and became a party thereto by the payment of checks drawn with the notorious intent to so misappropriate the funds. Had such diligence been once exercised by the bank when it had it in its power to protect not only itself, but the innocent and helpless creditors of bankrupt estates, there can be no doubt that there would have been funds on hand to pay the creditors of case No. 2105, including the defendant in error in this case when the checks in controversy were presented. If the court had refused on such notice to correct the evil which was being practiced, then in self-defense it would have been the duty of the bank to refuse to longer continue as the depository of such a court, and the court would have laid itself liable to impeachment.

Fifth. Notwithstanding the fact that defendant bank had opened the account with "the United States District Court for the Southern District of Illinois," and credited the funds received in bankrupt cases generally to the credit of said cour in the manner directed by the clerk of said court, and notwithstanding the further fact that from time to time the bank settled said account with said court as a general account, was it, nevertheless, the duty of said bank to keep the funds received in each case of bankruptcy as a separate fund to be applied only to the payment of such checks as were drawn in and numbered in the particular case from which such funds were derived?

The finding of facts, No. 13, does show that in nearly seven years, from March, 1873, to February, 1880, the bank balanced its account with the court nine different times, showing each time a balance on deposit to the credit of the court, and that at each balancing all the checks theretofore paid by the bank were returned to the clerk. It is evident that these balancings received as little specific attention from the court, and that the court had as little actual knowledge of their import as it had of the manner in which the account had been managed by the clerk in detail, and of the specific character of the checks which the clerk had drawn, and which the court on presentation to it had countersigned; but we are unable to see how the fact, that the court may have been negligent in its examination of the account at each of these balancings, can protect the bank in this diversion of funds. As before suggested, we positively deny the power of the court to compel this bank to pay out funds in its custody to any person not entitled to any portion of such funds. If no fund belonging to any particular estate was on deposit in this bank, then no creditor of such estate ever had any claim against the bank by virtue of his creditorship. Nor would any creditor have any claim against the court by virtue of his creditorship of an estate, unless it appears that funds belonging to such estate have come into the possession of the court. The first balancing of the account by the bank was on August 30, 1877, a period of nearly four years and a half after the opening of the account, during all which time, as may be supposed, this misappropriation of funds was continually going on. The bank having full knowledge of it from its own books and the face of the checks presented, never took the precaution to call the attention of the court to it at any time. It may well be doubted if

the judge who presided in said court ever saw any of these checks returned to the blerk at the time of the balancing of the account, and if he did, his oversight or negligence in failing to detect the wrong which was being perpetrated, was no justification to the bank for its negligence in failing to notify the court that this wrong was being done.

Sixth. Did the fact that the bank understood when deposits were made, that the numbers on either side of the account, as 2105 in this case, referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn, require the bank to keep the funds belonging to said case for the payment of checks drawn therein, notwithstanding the fact that the account was opened and kept as a general account with the court, as directed by the clerk of the court, and had from time to time been settled with the court as a general account?

We are unable to see how the fact that the bank may have kept the account as a general account can effect its liability to the creditors of the estates to which it knew the funds deposited with it by the clerk of the court belonged. It knew that funds to the amount of $38,300 deposited with it by the clerk of the court belonged to case No. 2105 in said court. It knew that by the provisions of the bankrupt law, the creditors of the estate represented by No. 2105 would at some time be entitled to call for such portions of the amount deposited with it to the credit of said case as their respective dividends might entitle them to. Upon what principle of law, equity or good morals can it be said that the mere fact that the bank, knowing all these things, had chosen to mix these funds with other funds in its custody should absolve it from the liability which

notice in the first place fixed? When notice has once been given to the bank of the character of the funds in its custody, that notice will continue in its effect until the bank shall be released from the effect of that notice by the party entitled to its benefit. All that remains of this inquiry is, what effect does the fact have that the bank had "from time to time settled with fhe court as a general account." If the bank knew a wrong was being perpetrated by the manner in which the funds in its custody were being misapplied, it will hardly be contended by any one that such wrong could have the effect of legally divesting any one of his right to funds in the custody of the bank; or that the assent of the court to the wrongful acts of the clerk and the bank would absolve either the clerk or the bank from liability. If the position of counsel for plaintiff in error is correct, then it follows, *that it only needs the assent of a court to render valid a notoriously illegal and criminal act of one of its subordinates.* Such a position, we maintain, needs no discussion. On the other hand if the court did not know at the time of these several settlements that the funds in the custody of the bank were being misappropriated, then it can not be contended that the implied assent of the court, influenced by ignorance or deception could be any protection to the bank.

Seventh. Did the fact that the bank understood when deposits were made that the numbers on either side of the account, as 2105 in this case, referred to the case, in which the deposit in the first place was made and in which the check in the second place was drawn require the bank to keep the funds belonging to such case for the payment of checks drawn therein?

We believe that an affirmative answer to this question decides this case. It presents the only question necessary to be answered on the facts found by the court in this case in order to determine how it should be decided. If the bank had knowledge that a certain deposit belonged to a particular estate in bankruptcy, then we insist, it must take notice of the law which dedicates that estate or the proceeds thereof to the payment of the creditors of such estate. With this knowledge it became the duty of the bank to hold such proceeds or deposits for the payment of the creditors of the estate to which the deposits belonged, and for no other purpose. The notice implied by this question, and which the findings of the court show that the bank had, is sufficient notice in its character to charge either a bank or a private individual at any time with knowledge of the character of funds which it or he may have in custody, and for either, under such circumstances, to permit funds to be paid out for any other purpose than such as this notice informs them is the purpose for which the funds are held, is gross negligence, and the rule is too well settled in commercial transactions that where one of two parties must suffer loss in a business transaction, the one through whose negligence the loss was permitted to occur must be the one to suffer rather than the one who has been guilty of no negligence. The bank held this fund as a trust fund for the benefit of the estates represented in case No. 2105. It could hold it for no other purpose. The court had no right under the law, even if it attempted so to do, to order these funds paid out for any other purpose than in satisfaction of claims allowed against such estates. The law itself could have used it or dedicated it to no other purpose without the perpetration of a wrong so monstrous that it will not be imputed as the pur-

pose of any law-making power. When Congress, in the exercise of its constitutional power, passed the bankrupt law, it intended, as the provisions of that law abundantly show, that the debtor who was unable to pay his debts in full should be discharged from his liabilities upon the surrender of all his estate for the benefit of *his* creditors; not that he should surrender it for the benefit of the creditors of another debtor, nor that he should surrender it for the purpose of forming a common or general fund out of which all creditors might share to the extent of their dividends allowed against particular estates, nor yet for the purpose of establishing a general fund to be distributed by a court as it might see fit. The language of the law is explicit and its purpose is too evident to admit of question.

Eighth Was the fact that the bank understood when deposits were made, that the numbers on either side of the account, as 2105 in this case, in which the deposit in the first place was made and in which the check in the second place was drawn, sufficient notice to the bank of the nature of such deposit to justify it in refusing to pay out any of the funds arising therefrom on checks drawn, as indicated therein, in cases in which no deposits had been made by the clerk?

If the bank at the time a deposit was made had any notice of the character of such deposit or of the estate to which it belonged, then it had such notice as would put it upon inquiry in order that it might ascertain definitely the character of the deposit. In this case, however, the question implies that the bank had definite and certain notice of the fact that the funds deposited in case No. 2105 belonged to an estate in court represented by that number. If then the bank knew from the number

2105 on the deposit ticket and on its own books that the funds thus deposited belonged to such estate, can it be doubted that such notice was sufficient, not only to the bank to make it responsible, but that it was sufficient to justify it in refusing to pay out any of those funds on checks drawn as indicated therein in cases in which no deposits had been made by the clerk? In this connection we but repeat again the illustration before given. If this suit were brought to recover from the bank the amount represented by the checks herein, and the bank could show that no funds belonging to this case had ever been deposited in the bank, or that all the funds deposited in this case had been paid out on checks drawn in this case, we submit that there can be no doubt as to the sufficiency of such defense. Such action on the part of the bank would show such a degree of care for the correct application of the trust funds in its keeping, and for the rights of the parties entitled to those funds, that no court would for a moment entertain the idea of holding it to a liability in a suit like this, when upon its showing it was clear that it had discharged its duty with the strictest fidelity, and had already paid out the funds to those to whom in law they rightfully belonged. If therefore, such a payment of the funds would be sufficient to discharge the bank from liability in a suit of the kind suggested, we maintain that any other payment of such funds is so far a misappropriation of them as to charge the bank with liability for such misappropriation. Nor would it matter that upon such suit it should admit that while all the funds belonging to case No. 2105 had been paid out on checks drawn in said case there was still a large sum remaining in the bank to the credit of the court. The fact that any amount, however large or small, might remain there to the credit of the court would not entitle defendant in error in this case to recover judgment against

the bank unless it was shown to the satisfaction of the court that there were funds in the bank upon which he had a legal claim, and which were held in law for the payment of the indebtedness due him from the estate in bankruptcy. He could have no legal claim on the proceeds of other estates in which the court had allowed him no dividend. If he could have no claim against such estates, then the creditors of such other estates had no right to the funds in the custody of the bank belonging to case No. 2105, nor had the bank any right to use such funds in the payment of checks drawn in favor of the creditors of such other estates.

It is insisted by counsel for plaintiff in error that this suit has been occasioned by the failure of the late clerk to deposit in the bank all the funds received by him in bankruptcy cases, and as such, belonging in the registry of the court. There is in this record no finding of fact that the clerk failed to deposit money received by him in any case, nor is it by any means certain that this difficulty would have been avoided if all such deposits had been made, for, if position of counsel is correct, that the bank was obliged to honor every check drawn by the clerk and countersigned by the court, funds might very easily have been withdrawn by the improper act of the clerk under the apparent sanction of the court: but the fact that the clerk may have received or did receive moneys which he failed to deposit, is not the occasion of this suit, nor does it bear any known or certain relation to it. If it be true as contended by the bank, that there are now no funds in its depository with which to pay the checks upon which this suit is brought, then this suit is occasioned by the negligent act of the bank in paying out checks improperly drawn by the clerk in favor of creditors of estates from which no funds had been

deposited. Whether any funds belonging to such other estates had or had not been received by the clerk is wholly immaterial. The bank did not stop to inquire whether the clerk had received funds or not, but obligingly honored all checks presented, and, for anything appearing here, would just as readily have paid checks in favor of creditors whose bankrupt debtors had no funds whatever, as those whose estates had thousands on deposit in its vaults. It was the duty of the bank to look to its own books or whatever source of information it had to ascertain if funds had been deposited which were properly applicable to the payment of any check presented, and thus protect itself. Not having done so, it has no right to come into court and ask to be protected from the consequences of its own negligence. But is this suit occasioned by the improper act of the clerk? The record does not show, as we contend, any such improper act in relation to the funds belonging to case No. 2105. All these funds were deposited in defendant's bank as was the duty of the clerk. All the checks which the record shows, have ever been drawn in favor of the beneficiaries of the estates represented by said case, amount only to the sum of $33,356.19, and in law the money necessary to meet the checks in controversy is still in the custody of the bank. Whenever a check was drawn in favor of a creditor of an estate which had no funds in the depository, the bank, upon the presentation of such check, from the notice which its own books afforded it of the nature of the deposits which it held, knew that fact. If it paid such a check it did so of its own volition, and we insist that in so doing it paid it out of its own funds and not out of the funds belonging to this estate. We insist that in so doing it simply advanced the money on such check, paying such advancement out of its own funds.

Whatever has thus been paid out on checks drawn in cases where no deposits have been made is simply a deficiency in the funds of the bank, and an attempt is now made by the bank to appropriate to its own benefit, in order to supply such deficiency, the funds belonging to case No. 2105. It can not be questioned that if at the time of the presentation of any check drawn in a case in which no deposit had been made, there had been no money whatever in the depository to the credit of the court, the payment of such a check by the bank would be regarded only as an advancement by the bank. The material facts in this case do not differ from those in the case supposed. At the time of the presentation of the unauthorized checks, which it is claimed this bank has paid, there were no funds in the depository applicable to the payment of those checks, and we maintain that the bank has no right to appropriate money deposited for the benefit of the creditors of estates represented in case No. 2105 to make good advancements made on checks drawn in other cases.

Much stress is placed on the alleged fact that the clerk had received moneys from estates in bankruptcy which he did not deposit with this bank, and, so far as known, did not place in any other depository, but, as is contended, converted the same to his own use. If such was the case, the clerk, by his improper act, became debtor to the estates whose money he had thus used. If then, to discharge this indebtedness, checks were drawn in such cases upon the bank and funds were paid out thereon, it amounted only to a conversion to his own use, by the clerk, of such funds. They were used for the purpose of discharging the indebtedness for which he was liable to the estates whose money he had used. In fact, as against the creditors of this particular fund, any attempt by the clerk or

any other person to use it for any other purpose than the payment of the claims of the creditors of the estates from which such fund was derived, or the legal costs of such proceeding, is a conversion of the funds to his own use by the clerk or other party so improperly withdrawing them. It will not be denied, we presume, that if the bank permitted the clerk to convert funds which it held for specific purposes, to his own use, in such case the bank would be liable. Now we maintain that whenever a check was presented in a case from which no deposits had been received, the information standing on the books of the bank and the face of the check, apprised it of the fact that such attempted withdrawal of funds by the clerk was a conversion thereof to his own use, and the bank, whenever it honored such a check, did so at its peril, and by so honoring it acquired no lien on the funds then in its vaults belonging to other estates, or on funds to be deposited which should belong to other estates.

Counsel for plaintiff in error say that requiring the bank to keep a separate account with each case, with its name and number, would lead to absurd conditions because the evidence shows that there were nearly five thousand cases, and at least two of them bore the number, 2105, and because different names were used in a single case having but one number; as in the case of Hiram Sandford & Company, bankrupts, the individual members of the firm were adjudged bankrupt, and checks in the case of each were drawn in the matter of his bankruptcy, but all having the number 2105.

The finding of fact, No. 5, shows that whenever a deposit was made in the bank, the deposit ticket, brought by the clerk to the bank with the deposit, showed the number of the case to which

the funds deposited belonged; and paragraph seven shows that the officers of the bank on receiving deposits accompanied by such ticket understood the number 2105, on the ticket, referred to a case of that number in the district court. Paragraph twenty shows that civil, criminal and admiralty cases were numbered from one consecutively and, at the time the deposits in question were made, there were two cases numbered 2105 in the district court. There was no evidence that deposits were or were not made in this bank in favor of or checks drawn on any other number 2105 than those drawn in this bankruptcy case. The other case numbered 2105 was either an admiralty case or a criminal case, but the court found there was no evidence that any deposits had ever been made in the bank belonging to said case, nor that any checks had ever been drawn in any such case. On the contrary, the evidence shows that all the checks drawn were entitled "in bankruptcy cases" and bore upon their face the name of the bankrupt, as well as the number of the case. Whether or not confusion might have arisen where two cases bore the same number, in both of which deposits had been made, is immaterial here. It is not found by the court that any possibility existed for confusing the funds belonging to this case with the funds belonging to any other case of the same number, nor is it found such loss occurred through any such confusion of funds. If the money deposited in this case No 2105 had been used to pay checks in any other case bearing the same number, there might be some plausibility in the argument that the negligence was the negligence of the clerk, and that the bank was not negligent, but no such fact was shown or claimed, nor does it exist. The fact is that the bank received on deposit money in case No. 2105 and refused to pay it out upon checks drawn in that case. It must be justified or condemned on the facts as they are found by the court, and

not on what might have been. If there was sufficient on the face of the checks to raise a doubt in the mind of the banker as to whether the checks belonged to the case in which deposits had been made, it was the duty of the bank to ascertain the fact before paying, and in default thereof, it paid at its peril.

Counsel say: "There should be no contention among the beneficiaries of the court as to which of them should be paid from the money left with the court for them. Because the money taken from the treasury of the court happened to be derived from one particular source, is no reason why the court should compel the parties for whom that money was intended to bear the whole loss.'

There are no beneficiaries of the court. The beneficiaries are the beneficiaries of the several estates in process of settlement, and whatever money is paid into court from any estate, is so paid for the benefit of persons interested in that particular estate, and is not to create or augment a general fund of the court for the payment of such claimants as may be found to be creditors of *some* estate in bankruptcy. All moneys received from any estate are for the creditors of *that* estate, and not for the creditors of *all* bankrupt estates, nor for the creditors who may first prove their claims and procure an order for payment. As the beneficiaries are beneficiaries of the estates of which they are creditors, it seems highly proper that they should contend that the proceeds of the estates of which they are creditors should be applied to the payment of their claims and not absorbed in paying claims in other estates, or in making good overdrafts on the bank which it has paid in cases which had no funds deposited with it. We agree with counsel that there is no reason why the court should compel the parties for whom that money was intended, to bear the whole loss. We go further: The court has no right to compel these parties for whom this money was intended to bear *any* loss. It was the duty of the court to apply

these funds to the payment of the creditors of the estates represented in case No. 2105, and so far as these creditors are concerned, the court has no right to consider whether creditors of other estates will be paid or not, on account of the funds belonging to such estates having been misappropriated. The money for which this suit was brought was collected, deposited and intended for the creditors of the estates represented in case No. 2105 in bankruptcy, of whom defendant in error was one, and he has done nothing to divest himself of his right to it and should not be deprived of it by the wrongful act of the clerk or the negligent act of the bank.

Counsel further say: "The law required the clerk to give security for his conduct. Let his sureties make good the loss, so that all can be paid alike."

But the law does not require the clerk to give security for the conduct of the bank in the performance of its duty, and whether the law requires the clerk to give security or not, can not affect the liability of the bank which is fixed by notice of the character of the funds which are placed in its depository. Aside from the bond of the clerk, the law required the deposits to be made in the bank and payment to be made therefrom. The bond of the clerk alone would furnish but slight security for the total amount of funds that would come into his hands. The bond was only in the sum of twenty thousand dollars, and the record shows that there was, at the date of balancing, January 10, 1880, $32,670.57 in the bank to the credit of the court, so that the aggregate liability greatly exceeded the amount of the bond. The record shows further that there had been, at the time of making the dividend in this case, $38,300 belonging to said case alone in the custody of the bank, and we maintain that

all said amount, not withdrawn by checks for the payment of liabilities in said case, is still in the bank to the credit thereof, so it will be readily seen that if the creditors of bankrupt estates were compelled to rely alone upon the bond of the clerk for their security, such bond would be wholly insufficient as an indemnity. But let us examine for a moment and see whether defendant in error can successfully maintain a suit on the bond of clerk Bowen for the amount represented by these checks. The law required the clerk to deposit funds received in each case in bankruptcy in a designated depository. If he failed to deposit the funds in accordance with his duty, then his bondsmen would be liable because of his failure to perform his duty and a consequent breach of the conditions of the bond, but if he deposited the funds in the bank as required by law and under the order of the court, there has, so far, been no breach of the bond. It is not contended that any of the funds belonging to case No. 2105 were withheld from the depository. On the contrary, it is found by the court that all the funds which had been paid into the registry of the court belonging to this case had been deposited by the clerk with plaintiff in error. Thus far, the clerks performed their whole duty with regard to these funds, and thus far, no breach of the bond occurred. No check was ever drawn upon this fund by Clerk Bowen, no dividend having been made in the case until after his death. Was he then, guilty of any misappropriation of this fund? If not, did a breach occur of his bond of which defendant in error in this case, or any other creditor of this estate is entitled to an advantage? Further, the record shows that of the aggregate fund belonging to this case, deposited with plaintiff in error, $12,300 thereof, was deposited by clerk Converse after Bowen's death. It can not be contended that

any breach of duty on the part of Bowen ever occurred with regard to this amount, which Bowen himself did not receive, but which was received by his successor and deposited with the bank after Bowen's death. Certainly no suit can be maintained on his bond for a misappropriation of this portion of the funds. No claim is made that any improper checks were drawn by Clerk Converse, or that any checks have ever been drawn by him, except in cases in which deposits were made. Then the money deposited in this case must have been applied by the bank, not in the payment of checks in cases where no deposits were made, for no such checks were drawn after this money was received, but it was applied to make good to the bank overpayments which it had made in cases where there were no deposits—payments upon the checks drawn by Clerk Bowen. If as suggested, a suit should be brought upon the bond of Clerk Bowen, what breach could be alleged? There is no breach of duty by the clerk as regards this estate or the creditors of it. The clerk deposited the funds of this estate with the bank, giving the bank the number of the case, 2105; the money has not been withdrawn by the clerk or by his order.

Bowen's connection with this case was terminated by his death. Up to that time, as the record shows, all the funds which he had ever received belonging to said case, were deposited with plaintiff in error. He never drew a check in said cause, nor did he ever refuse, so far as the record shows, to draw a check in said cause in favor of any creditor of the estates embraced in said cause.

Has there, therefore, been any breach of the conditions of his bond by his conduct with reference to the funds belonging to such estates?

Clerk Converse has properly given checks upon the bank to the creditors of these estates for the dividends payable to them, and the bank refused payment. So far as this particular case is concerned, there is no breach of duty, except by the bank itself. Can it be contended that the defendant in error can maintain on these checks a suit on the bond of the clerk, because the clerk failed to deposit money arising from estates in which defendant in error had no interest whatever, and from which he would have no right to receive a cent, no matter how much money belonging to such estates might be in the custody of the court?

If such suit were brought, it is evident that Bowen's sureties would at once truthfully answer that all the funds ever received by Bowen belonging to the estates in case No. 2,105, were deposited by Bowen with plaintiff in error, and that he never withdrew them by the use of any fraudulent check purporting to be for the benefit of any beneficiary of said estate, or by a check requiring the bank to pay from such deposit.

Could Bowen's bondsmen be held liable to defendant in error on these checks, because the bank had paid checks drawn by Bowen in favor of the creditors of estates from which no money had been placed in its depository? How would it concern defendant in error that Bowen, as is alleged, had failed to deposit in the bank moneys belonging to estates in which defendant in error had no interest? It may be that if in his dealings with the bank, the clerk was guilty of such malfeasance in office by the withdrawal of funds as to constitute a breach of his bond, the bank might have recourse upon such bond, but it by no means follows that defendant in error would have any such remedy, because defendant in error had no interest in the estates in which it is alleged Bowen failed to deposit the money.

But we insist that whether defendant in error has or has not a remedy upon the bond of the clerk, in no manner, affects his right of recovery in this case, for the bank received money to which defendant in error is now entitled, with actual knowledge of the case to which it belonged, and constructive knowledge of all the beneficiaries of said case, and it is bound to meet the claims of such beneficiaries whenever asserted.

We wholly fail to appreciate the force of the arguments of plaintiff in error, in which it is contended that the persons paid by means of the checks representing estates in which no money had been deposited in the bank, were as much entitled to payment from funds in the bank as plaintiff in error. Such argument is based upon no equitable idea, and is utterly without foundation either of morals or law. How is it shown that the estates represented by such improper checks ever had any money in the custody of the court, or that the creditors of such estates ever could have realized anything in bankruptcy. Counsel for plaintiff in error argue at great length that such is the case, and that funds belonging to estates represented by such checks were improperly retained by the clerk, but there is no finding of facts in this record justifying any such assumption. If the clerk did convert to his own use funds belonging to other bankrupt estates, that gave to the creditors of such estates no shadow of claim upon the funds so belonging to the estates in case No. 2,105. They have their undoubted right of action upon the bond of the clerk. They have their right to recover to the extent of the bond, and to realize upon the bond so far as the amount of the bond would indemnify them. If, unfortunately, they have partially or wholly failed to receive what is due, then that gives them no right

of action against the bank in which their funds were never deposited, nor does it give them any claim upon the funds in the bank belonging to estates in which they had no interest.

By the Bankrupt Act, section 11, the person desirous of taking the benefit of said act was to file a petition setting forth *"his willingness to surrender all his estate for the benefit of his creditors."*

He was not required to surrender it for the purpose of creating a "common fund" out of which all creditors of bankrupt estates might be paid, or out of which any creditor of any bankrupt estate might be paid at the whim or caprice of the clerk or by the favor of that official. He must surrender his estate for the benefit of *"his* creditors" and when so surrendered the court must devote it to that purpose and no other.

REVIEW OF CASES.

Counsel for plaintiff in error have cited a number of authorities in support of their position, which we will briefly review, with the suggestion that a critical examination will show that not one of them is an authority in favor of plaintiff in error upon the facts as found in this case. The first case cited by counsel is that of *National Bank* v. *Insurance Company*, 104 U. S. 54, from which the following extract is made:

"A bank account, it is true, even when it is a trust fund and designated as such by being kept in the name of the depositor as trustee, differs from other trust funds which are permanently invested for the sake of another, held as such; for a bank account is made to be checked against and represents a series of current transactions, and the contract between the bank and the depositor is, that the former will pay according to the checks of the latter, and when drawn in proper form the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly."

Counsel say "that the foregoing is precisely in point on the question at issue here. The deposits were made to the credit of the court." Let us see. It is true that the account was kept with "the United States District Court for the Southern District of Illinois," but it is not strictly true that the deposits under the head of that case were made to the credit of the court alone. The deposits were made to the credit of the particular case designated by the number on the depositor's ticket, which number was in every instance transferred from such ticket to the books of the bank, and entered with the deposit. It is true that a bank account is made to be checked against, and represents a series of current transactions; but in order that the money paid upon a check may be charged against the particular account, it must be drawn in proper form against such fund.

The court say: "The contract between the bank and the depositor is that the former will pay according to the checks of the latter, and when drawn in proper form, the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly."

First, Were the checks drawn in favor of distributees of estates from which no money had been deposited in the bank, "drawn in proper form," so as to compel the bank to honor them and pay them out of the funds deposited from other estates? We submit that they were not.

Under general order in bankruptcy, No. 28, it is necessary that every check should show the account on which it is drawn, and so far as this record discloses, every check did show the account on which it was drawn. How did the court interpret the meaning of that requirement? That is plainly shown by the form of the check used. It is found by the court in this case that every check contained, not only the number of the case, but the name of the bankrupt estate. Was a check which

contained a number from which no funds had been received by the bank, and the name of a bankrupt not represented by the number of any case from which funds had been received, in proper form to compel, or to even justify the bank in paying upon such check, money derived from other estates?

Second. The language of the court is: "And when drawn in proper form the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly." The force of which is, that when the check is properly signed, the bank may presume that all is right. This then is only a presumption. It does not conclusively and of itself settle the duty of the bank to pay the check. This presumption may be removed by inquiry, and where there is anything in a transaction which would suggest the propriety of inquiry on the part of the bank, it will not be relieved of responsibility, even by this presumption, if it fails to exercise due diligence and make such inquiry. A presumption is never allowed to stand against positive, known facts which indicate exactly the opposite of the presumption. In this case the record shows that from its own books the bank knew to what cases the deposits in its custody belonged, and it also knew whenever a check was presented in favor of a creditor of an estate from which no funds had been deposited, that there was in its vaults no money belonging to the estate named in such check, and represented by the number thereon. Hence we conclude that the check was not in proper form, because it was not a check drawn against any fund liable to its payment. Again, so far from any presumption that the trustee was in the course of lawfully performing his duty, the books of the bank and the improper checks, both, in every

instance showed that the trustee was attempting to misappropriate funds, if he intended such checks should be paid out of the funds deposited to the credit of other cases. We maintain that the foregoing extract from the opinion of the court is, therefore, not only not an authority in support of the position of plaintiff in error, but that plaintiff in error has wholly failed to bring itself within the rule there laid down, and that such rule is no protection to it under the circumstances disclosed by the record in this case.

Counsel further say: "There was nothing in the withdrawal to indicate that the trustee was appropriating money to his private ends, nor was such the fact in the case."

We maintain that as between the clerk who deposited these funds and defendant in error as a creditor of case No. 2105, every diversion of the funds belonging to that case to any purpose other than the payment of the creditors of such case, was an appropriation of such moneys, by the clerk, to his private use. It went by force of his will wherever he directed it. If it did not go to the creditors of that estate, it is immaterial where it went. The clerk had a purpose of his own in directing its payment, and whether that purpose was the payment of a private debt of his own, the restoration of the money to his individual pocket or the discharge of an official liability to other estates whose money he had received and improperly converted, it matters not as against the defendant in error, for such use of the money was a conversion of it to the private end of the clerk. This, the bank knew, as we maintain, by virtue of the knowledge furnished by its own books, and of the knowledge notorious on the face of every check presented and paid at its counter. It is not true, therefore, that all the money

withdrawn by the clerk purported to be in the fulfillment of his trust. Every dollar received by him from any bankrupt estate was in trust for the creditors of that estate and for no other purpose whatever. No other use of such dollar, therefore, was in the fulfillment of that trust, and whenever the bank knew that such dollar was being withdrawn for any other purpose, it knew that it was not withdrawn for the purpose of the trust. It is not enough that a check should be drawn against the bank by the clerk or trustee, as such. Before the bank could honor such check, that check must be in proper form, and even then, there must be an absence of knowledge on the part of the bank of any attempt to divert the funds, before the presumption which the court says it may exercise in some cases will obtain. It is said by counsel: "A bank has no right to control a trustee in the execution of a trust." But we maintain that when the trustee was attempting to divert moneys deposited with the bank to other purposes, such diversion, so far from being an execution of the trust was a perversion of it, and of this the bank had knowledge. While it can not control the trustee in the execution of the trust, it could control the money within its own vaults and prevent the trustee from withdrawing it for a purpose not contemplated by the trust. In said case this Court say further:

"But when, against a bank account designated as one kept by a depositor in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, the bank must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist in whole or in part of funds held by him in a trust relation."

In that case the fund deposited in the bank in the name of Dillon, general agent, belonged wholly to the Insurance Com-

pany, but the court held: That if it had been shown that such account consisted in whole or in part of funds held by him in his trust relation, the bank would be held to have notice that such fund was not his individual property. Where an account consists in part of funds held in a trust relation, the trust relation will attach to the entire fund represented by such account. Of this fact the bank must take notice, and when it pays any check drawn against such fund, if the check discloses on its face a purpose to divert the money from the trust, the bank pays it at its peril. It is not sufficient, as counsel suggest, that it concerns the bank only to know that the depositor purports to be acting as trustee. That might be sufficient if there were no circumstances to put the bank upon inquiry in order to ascertain whether in fact the depositor was acting as trustee, but it is wholly insufficient when the bank has knowledge that the trustee is attempting to pervert the trust, and use the funds for a purpose other than that to which the law has dedicated them.

In the case above cited the court say:

"It will be observed that the question arising here is not what the rights of the parties would be if the note had been taken up by Dillon's check upon that account, the bank having no knowledge of its character except what might be inferred from the use of the words "general agent," at its head. When the attempt is made with actual knowledge, which we find imputable to the bank, and without Dillon's consent, to pay itself his overdue note out of a fund for which as agent for the insurance company, he was bound to account to it."

And so in this case, if instead of showing upon their face, as did all the checks improperly drawn, that they were drawn in cases which had no funds on deposit, they had been drawn in the name of the bankrupt estates represented by case No. 2105, and if they had borne the

number of such case, then the condition of affairs which the court says would have relieved the bank from responsibility in that case would exist here, and the bank would not be liable. There the attempt was made by the bank, with actual knowledge imputable to it of the character of the fund deposited by Dillon as general agent, to appropriate the fund to the payment of its own debt, which the court would not allow. In this case the court finds that the bank had knowledge at the time of the deposit, of the estate to which the funds belonged. That knowledge remained with it continually, and whether it be contended that all of the funds deposited were paid out upon checks drawn upon the bank, and that in consequence, no fund remained in the bank account with the United States District Court, or whether, as we maintain is correct, whenever the bank paid a check improperly drawn, it paid it out of its own funds, and is now seeking to reimburse itself out of the funds belonging to particular estates, of which case No. 2105 is one, under the rule laid down in the case above cited, the position of the bank is untenable, and its liability to pay the checks in controversy is fixed. So far, then, from that case being an authority in favor of plaintiff in error, we maintain that the rule therein laid down fixes its responsibility, and it must pay these checks.

"A banker's lien on securities and moneys deposited in the usual course of business for the advances which are supposed to be made upon their credit, ordinarily attaches not only against the customer, but against the unknown equities of all others in interest, unless it be modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion, but it cannot prevail against the equity of the beneficial owner, of which the banker has either actual or constructive notice."

The foregoing is from the same case so confidently relied upon by plaintiff in error. The lien of the banker could only attach

against the unknown equities of all others in interest, when such unknown equities were unaffected by any conduct inconsistent with its assertion, but it can never prevail against the equity of a beneficial owner, of which the bank has either actual or constructive notice. The bank had actual notice of each case to which every dollar of the fund in its depository belonged, and it had constructive notice of the beneficiaries of such fund. Therefore, the lien of the bank upon these funds, under the circumstances disclosed by this record, and of which there can be no dispute, does not attach.

The next case referred to in support of plaintiff in error is *Duncan* v. *Jaudan*, 15 Wall. 165. In that case, Jaudan, the trustee, had pledged to Duncan, Sherman & Company, to secure his private debt, stocks which he held as trustee, concerning which the court say:

"It follows, then, that the use of the stocks by Jaudan in this transaction with the bank and Duncan, Sherman & Company, was on his part a flagrant breach of trust, without either justification or excuse. If so, are they blameless? They can not be if they had actual or constructive notice that the trustee was abusing his trust and applying the proceeds of the loan to his own use. As we have seen, the loans were for no purpose connected with the trust, but for Jaudan's own benefit, and the face of the papers given as collateral security for the debt thus incurred informed the parties dealing with him that he held the stock as trustee for Mrs. Mary T. B. Jaudan, and inquiry would have revealed the fact that the use to which the stock was put was unauthorized. The duty of making such inquiry was imposed on these parties, for it is out of the common course of business to take corporate stock held in trust as security for the trustee's own debt. The party taking such stock or pledge, deals with it at his peril, for there is no presumption of a right to sell it, as there is in the case of an executor. In the former case the property is held for custody—in the latter for administration. It matters not whether the stock is pledged for an antecedent debt of the trustee or for money lent him at the time. It is unlawful to use it for either purpose."

In the foregoing case, this court holds that the mere fact that it was out of the common course of business to take corporate

stock held in trust, and that Jaudan, the trustee, was making a pledge of such stock as security for a debt, was such constructive notice to Duncan, Sherman & Company of the breach of trust as to put them upon inquiry, and not having inquired, they are not held blameless, but are parties to the fraudulent transaction, and are liable for the fraudulent conversion of the stock; that having constructive notice, they are chargeable for everything which upon inquiry they could have ascertained from the *cestui que trust*.

In the case at bar plaintiff in error had more than constructive notice of the attempted misappropriation of funds by the clerk. It had actual notice from its own books as to what estates had funds in its depository, and it had actual notice on the face of every check drawn in a case from which no funds had been received, that there were no funds in the depository liable for the payment of such check.

"If a party dealing with an executor has at the time reasonable ground for believing that he intends to misapply the money, or is in the very transaction applying it to his own use, the party so dealing is responsible to the person injured."

Taney's Cir. Court Dec. 310.

"Notice of the existence of a trust is by all the authorities held to impose the duty of inquiry as to its character and limitations. And whatever is sufficient to put a person of ordinary prudence upon inquiry, is constructive notice of everything to which that inquiry might have led."

Shaw v. *Spencer et al.*, 100 Mass. 3[illegible]0.

"Now whether the bankers in their own minds, or even in their own books, if the fact had been so, treated the 'Rotherwas account' as if it had been a private account of Mr. Parke's, the question is whether they had a right to do so; whether they had a right to say, knowing from the facts that the money placed to that account was Mr. Bodenham's money, and that any balance standing to the credit of that account at any time was Mr. Bodenham's balance, that they

could make such an arrangement with Mr. Parke's as that at any time they should be at liberty to appropriate the balance to the credit of that account toward the liquidation of the balance standing to the debit of the private account of Mr. Parke's. It appears to me that upon every principle of equity they had no right to do so. It appears to me that it is not a question whether simply at the time when the check was drawn for the 829 l., they had a right then to allow that check to be placed to the credit of the other account; but whether they had a right even to make an arrangement with Parke's to that effect; whether they had a right to say that the receiver should so deal with them as to make his principal's money at any time liable to be appropriated to discharge the private debts of the receiver to the bankers. I am quite satisfied that upon all principles of equity that could never be done. * * * * * * A person who deals with another, which other he knows to have in his hands, or under his control, moneys belonging to a third person, can not deal with the individual holding those moneys for his own private benefit, when the effect of that transaction is that that person commits a fraud on a third person."

Bodenham v. *Hoskins*, 13 E. L. & E. 233.

So in this case we contend that it is immaterial how the bank kept its accounts, or how it treated these funds. If it had the notice of the nature of the funds which the court finds that it had, and thereby constructive notice of the beneficiaries of the estate to which these funds belonged, such notice would fix its liability, and the mere fact that the clerk directed the cashier of the bank to keep the account in one form or another can not relieve the bank of the effect which the notice given to the bank at the time every deposit was made, must have in law.

In the case last cited, Parke's controlled three accounts in the bank, which, as in this case, it seems, the bank was disposed to treat as a general account; in regard to which the court said:

"If it be meant that the accounts were kept in the name of the same individual, then it is perfectly true; but it is a strange mode of putting the proposition, viz.: for the purpose of alleging that the accounts were headed in the name of Parkes to put it in this shape, to say that the bankers at the time of settling the accounts treated and acted on the three accounts

as one. It appears to me to be really immaterial what view the bankers took of it between the time when the Rotherwas account was opened and the 9th of July, 1847, when the balance of that account was transferred to the credit of the private account; because I find at the very opening of the account, nay some months, three months at least, before the opening of that account, the bankers were well aware that that account was the account of Mr. Parkes as receiver of the Rotherwas estate; and that the moneys which were to be paid in to the credit of the account were the moneys of Mr. Bodenham; and that it was for these very reasons that that account was to be kept as a separate account and so headed I am constrained to arrive at the conclusion that the bankers (though I must exonerate them from any deliberate intention to commit a robbery or commit a fraud) still were not only parties to the transfer but were parties to the fraud in question in this sense, that they were aware of the circumstances which made it a fraud in Parkes to make the transfer to his private account; and being cognizant of that, and having been cognizant of it before the time when the account was opened under the name of the 'Rotherwas account,' and being cognizant of it throughout, they concur in a transaction, the effect of which is that for their own private benefit an act is done by Parkes which is a fraud upon the plaintiff. Now according to the plain principles of a court of equity such an act can never be sustained; a party can not retain the benefit which he has obtained from being a party to such an act with such knowledge of the nature of the act."

In the case of the *United States Bank* v. *Macalester*, 6 Pa. St. 475, the State of Illinois had opened two accounts with the bank and made deposits in each. One account was a deposit of moneys for the payment of general improvements and the other for the payment of interest coupons upon stock issued by the State. Macalester held a considerable amount of these coupons and had overdrawn his account at the bank. The bank brought suit to recover the amount of the overdraft. Macalester pleaded a set-off, attempting to set-off against his account the coupons which he held, averring that the bank held money for the State of Illinois for payment of the same.

The bank replied that the State had deposited with it $10,149 for the payment of these coupons which had not been used

by it for that purpose, but the State had overdrawn the general improvement account to the amount of $29,803 and the bank had applied the $10,149 deposited for the interest account in liquidation of the overdraft in the improvement account. The court said:

"The overdraft by the State was on another fund. The fund was left secure and untouched, and it was *the folly of the bank* to pay the drafts when they knew the State had no money deposited on that account to meet them. The subsequent appropriation was an afterthought or means taken by them to make a setoff in part against the State. * * * Whether the setoff would avail against the State, we give no opinion; but as against the defendant, who was the holder of the coupons, it is entirely inadmissible. As long as the deposit is permitted to remain in their hands they are the agents of the holders of the coupons to the amount of the fund set apart for their payment. It would be a culpable breach of trust to appropriate the fund to any other purpose, and especially to apply it to their own use. The point is clear on principle and authority."

So in the case at bar. The bank held the money for the creditors of the estate from which it was received, and if the bank paid checks in cases in which no deposits were made that was "the folly of the bank" and was a credit given by it to the court or the clerk. There is no "principle or authority in law" which will permit the bank then to reimburse itself by applying to such overdrafts the funds deposited with it in case No. 2105 for the payment of creditors in that case.

A case strongly in point is the recent case of the *International Bank* v. *Jones, et. al.* 119 Ill. 407. John D. Oakford and Frederick H. Thomas were partners, having an account with the bank under the firm name of John D. Oakford & Co. The firm dissolved, owing the bank eleven thousand dollars overdrafts. The bank had knowledge of this dissolution. John D. Oakford notified the bank that he would continue in busi- under the former firm name. He deposited money with the

bank in the name of John D. Oakford & Co. (the old firm name) and on the same day drew a check payable to Joseph Jones & Sons. The bank refused payment and claimed the right to apply the funds in its possession to the payment of the overdrafts of the old firm of John D. Oakford & Co. Suit was brought against the bank by the holder of the check. The court said:

"The general rule is that a bank has a right of setoff as against a deposit only when the individual who is both the depositor and debtor stands in both these characters alike, in precisely the same relation and on precisely the same footing towards the bank, and hence the individual deposit can not be set off against the partnership debt. *Case* v. *Preston*, 105 Ill., 470. See also Morse on Banking, second edition, p. 48."

And the court referring to the actual knowledge which the bank had of the character of the deposit and the manner of keeping its books said:

"If the jury believed the witnesses testifying on behalf of the plaintiffs, it was wholly immaterial in what book or in what manner the entries of deposits were made, for in that event they must have found that the bank knew that the transactions were in fact with John D. Oakford alone, and that the deposits were made by him alone,—and it could not relieve itself of the effect of this knowledge by a subsequent entry reciting something different in a pass book. If, on the other hand, the jury believed the witnesses on behalf of the bank, that it had no notice of the change of partnership, and that John D. Oakford made the deposits on the first of September, the entries in the pass book were unimportant, they could add nothing."

Applying the same rule to the case at bar, the material point establishing the liability of the bank, is the actual knowledge which it had of the nature and character of the deposits made with it, and is not the manner in which the bank kept its books.

The bank knew that the deposits made with it were the proceeds of the estate referred to by the number placed upon the deposit ticket, and that those deposits were applicable only to the

payment of the expenses and creditors of that estate. If it permitted a diversion or paid the moneys for a different purpose, it did so in its own wrong.

"If the customer gives to his banker a specific sum for the express and declared purpose of enabling the banker to pay business paper on the customer made payable at the banker's, and if the banker, at the time, makes no objection to this arrangement, he can not afterwards apply this sum to any other purpose, as, for example, to reinbursing himself for any sum advanced by him to his customer on overdrafts, or to the payment of checks of the customer subsequently presented. Having received the sum for a certain specified purpose, he must hold it for and apply it to that purpose and none other, at least so long as that purpose remains unaccomplished."

Morse on Banking, Second Edition, 33.

It is no defense for the bank to say, that its payment was satisfactory to the clerk who made the deposits, for the beneficiaries of the several estates were the persons really interested in these deposits. It is said:

"The position of the bank with regard to the payment of checks, must often be a very delicate one, for it is, as it were, placed between two fires. If it refuses to pay a check which it ought to pay, then it is liable in damages to the depositor. If it pays a check which it ought not to pay, in ninety-nine cases out of one hundred the loss will be its own."

Morse on Banking, 276.

This is a responsibility which the bank assumed when it accepted the appointment of depository for the court, and it is a responsibility of which it can not relieve itself by charging negligence or misfeasance upon the clerk, and particularly so when it is shown that the bank had full knowledge of that negligence and misfeasance.

The case of *Fifth National Bank* v. *Hyde Park*, is referred to as supporting the position of plaintiff in error in the case at bar. In that case the court did not controvert any proposition of law here contended for in behalf of defendant in

error. While the court decided the case in favor of the bank, and held that the bank was not liable to the village for funds that had been appropriated by the village treasurer to pay his indebtedness to the bank for money borrowed by him, the court so held upon the finding of facts that the money loaned was borrowed by the treasurer, as he informed the bank, for corporate purposes and to pay the village warrants in anticipation of the collection of taxes, and that the bank had reason to believe, and did believe this representation, and loaned the money for that purpose, and that without any knowledge of bad faith by the treasurer, the bank received payment of its loan from the treasurer in money collected from the taxes, and gave up the private securities which it held.

The court held that the bank acted in good faith, without any knowledge of the wrongful character of the acts of the treasurer and could not be required to reimburse the village for its loss.

The court held the law as contended for by defendant in error here, but the vital question of fact found in that case, was that the bank did not have knowledge of the real source and application of the funds, while in the case at bar, it is conceded and the findings of fact specifically are, that the bank knew the number on the deposit tickets referred to the case from which the funds were received, and the number on the check referred to the case in which the payment was made, so that here the bank had full knowledge of the misapplication of the funds. The inevitable inference in the Hyde Park case is that if the court had found that the bank had knowledge of the real application and source of the funds there in dispute, it would have held the bank liable.

The case of *Otis* v. *Gross*, 95 Ill. 618, is referred to by counsel for plaintiff in error, but we submit that the case is not in point and does not decide anything in issue here. It only holds that where a bank, in which were deposited in a general way the funds under control of the Circuit Court of Cook county, became insolvent, the court stood on the same footing with all other depositors and could recover only the same proportionate share of its deposits as other depositors.

THE BANKRUPT ACT.

We will briefly call the attention of the court to a few of the provisions of the bankrupt act to show the manifest intention of the law in regard to the application of the proceeds of bankrupt estates. As soon as an assignee was appointed, it became the duty of the register to convey to said assignee all the estate of said bankrupt, and "*Thereupon, by operation of law, the title to all such property and estates, both real and personal, should vest in such assignee.*"

Bankrupt Act Sec. 14.

Such title being for the purpose contemplated by said act, namely, that the property should be applied in the payment of and discharge of debts for which it was liable.

"And the assignee shall keep a regular account of all moneys received by him as assignee, to which every creditor shall at all times have free resort."

Bankrupt Act, Sec. 15.

"That the assignee shall, as soon as may be, after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all money in his possession; and shall, as far as practi-

cable, keep all goods and effects belonging to the estate separate and apart from all other goods in his possession or designated by appropriate marks, so that the same may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property, or for the payment of his debts."

In accordance with the provisions of this section and to the end that the proceeds of any bankrupt estate may be devoted exclusively to the payment of the debts for which such estate is liable, rule 28 in Bankruptcy was adopted, providing that every check or warrant shall contain the information stated therein, including the number of the case, the account on which the check is drawn, etc.

"All creditors whose debts are duly approved and allowed, shall be entitled to share in the bankrupt property and estate pro rata: * * * At such meeting the majority, in value, of the creditors present shall determine what part of the net proceeds of the estate * * * shall be divided among the creditors; * * * in case a dividend is ordered, the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividends, and shall calculate and set opposite the name of each creditor who has proved his claim, the dividend to which he is entitled out of the net proceeds of the estate set apart for dividends, and shall forward by mail to every creditor, a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court shall direct." (Sec. 27.)

From all which it is clearly the duty of all persons dealing with bankrupt funds to take notice of the special character of each fund, and the beneficiaries entitled to it, so far as such facts are ascertainable. Claims in bankruptcy are provable only against the estate of the bankrupt debtor, and must be paid, if at all, out of the proceeds of his estate. It is the purpose and policy of the bankrupt act to do equal and exact justice between the estate of the bankrupt and his creditors. This can not be done if the estate of a bankrupt may lawfully be devoted to any other purpose than the payment of his debts, thereby leaving the creditor to suffer loss.

Morse on Banks and Banking, p. 40, uses the following language referring to the obligations of those dealing with trust funds:

"If the same person keeps separate accounts at the same bank in distinct characters, one being his individual account, and the other kept by him under any species of trust, if the bank has notice of the nature of the second account, it will be bound to keep the two separate, even in spite of the efforts of the trustee himself to intermingle them or transfer funds from the trust account to his private account. If the bank permits him to make such transfers, it will be liable to reimburse the beneficiary or principal, who has been robbed of his property; and if the customer has drawn out the fund so that his own account no longer furnishes a means of remuneration to the bank, it will have no recourse but to bear the loss."

Referring to a case already cited, the author says:

"The decision in this case, *Bodenham* v. *Hoskins*, 13 E. L. & E. 222, was based upon the ground that the banker had cognizance of the circumstances which rendered the conduct of the customers fraudulent; and so, though not, perhaps, morally culpable, they were yet in view of the law, parties to the fraud."

In a case of the same character as the one at bar, the *St. Louis Rail Fastening Co.* v. *State National Bank of Springfield, Illinois*, tried in the Circuit Court of the United States for the Southern District of Illinois, not officially reported, Mr. Justice Harlan rendered the opinion of the court, and that opinion as reported by the stenographer is in substance as follows:

"That bank (The State National Bank) is made a depository of this court. Under the statute it is made the duty of the clerk and other officers of the court receiving money to deposit it in that bank. The former clerk of the court made his deposits in the form indicated by their books. It was a little differently done at the outset, but after a while it was changed to conform with this mode. This account is headed "The Sate National Bank of Springfield, in account with the U. S. District Court for the Southern District of Illinois." On March 10, 1880, for instance, there is an entry on the debtor side of the account, deposit number 2197, ten dollars—2197, indicating the number of the case in which deposit was made. On the credit side, is the amount of the check, and opposite that the number. That number is taken from the check and indicates the case in which the check is drawn.

"There is no dispute in the evidence of this case that the bank understood when the entries were made, that these numbers on either side of the account, referred to the case in which the deposits in the first place were made and in which the check in the second place was drawn. There is a difference between the records of this court and of that bank as to what that bank owes. The former clerk of the court has, according to the evidence, received money on account of particular cases and failed to make deposits in the bank on account of those cases. He, nevertheless, from time to time, in pursuance of the orders of the court, drew a check upon the bank, each check indicating the number of the case, and the bank treating the account as an aggregate, and as an account only with the court, honored the checks. The result was, as we can see, on the face of the statement, that when the bank paid checks drawn upon account of a particular case, without deposit having previously been made on account of the case, it necessarily took from the general fund, in the bank, money which had been deposited on account of other cases."

Referring to the twenty-eighth rule in bankruptcy, the learned judge said:

"Now I think the clear meaning of this rule is—the words 'severally on account of any bankrupt estate,' mean that the officer, when he makes a deposit, must indicate, by the form of the deposit, the account on which he makes it. He would not be complying with the rule to make the deposits generally to the credit of the District Court of the United States. He must indicate in the form of the deposit the account on which the deposit is made. If in a bankrupt's estate, he should say, or have it said, upon the books of the bank, or upon the book which he keeps, that it is on account of the bankrupt's estate, A, B, C, D, or E. That construction is borne out by the fact that when a check is drawn, it is required by the rule to state the date, sum and the account on which it is drawn. Now I think that the deposit book is to be regarded and to be understood as if there was an account to be kept with each one of these cases, in which a deposit is made—as if it read 'The State National Bank of Springfield in account with the United States District Court for the Southern District of Illinois, on account of case 2197, in the bankrupt court,' and all entries of deposits made in the case on one side, and all the checks drawn against that case put upon the other. And I think in conformity with this rule the bank was bound to take notice, as the account progressed from time to time, of how much was deposited in each case—how much was due from the bank in each case—as the checks were drawn from time to time. And this distinguishes these cases, in my judgment, from the case in the Supreme Court of the United States referred to where the deposits were made generally, in one case by a paymaster in the army,

and in the other by a United States Treasurer. Here the deposit is generally to the credit of the District Court of the United States —but not stopping there, is particularly on account of these cases mentioned in these checks. And I think that there was on the part of the bank—both the bank and the court and everybody in this country being parties, in a sense, to this order in bankruptcy made by the Supreme Court of the United States—and an implied promise on the part of the bank, not simply with the court, but with the court and with each one of the parties interested in the several cases, that it would hold that money on account of these cases—and the law implies a promise from the bank to every one who receives a check drawn in the modes prescribed by this rule, that it will honor that check and pay that check to the party holding it; and that being the case I think that the check-holders have the right to sue here—to sue in their own names. It is their money, to which they are entitled under a promise from the bank that it will pay checks to them when presented."

It will be remembered that that case arose out of the same transaction as the case at bar, and was tried by Judges Harlan and Treat at the same time.

No further comment on this decision is necessary, than to say that it clearly and justly states the law as it should be declared between the parties to this suit.

THE REILLY CASE.

Counsel for plaintiff in error lay much stress upon the decision of the Supreme Court of the State of Illinois recently rendered in the case of *State National Bank of Springfield, Illinois* v. *Reilly*, and print in full in their brief, the opinion in said case. It is true, as suggested by counsel, that case arose out of the same circumstances as the case at bar, but it is not true that it was decided on a finding of facts, the same as that embodied in this record. Certain admissions were made in that case similar to the finding of facts in this case, but as the court will see, from said opinion, other evidence was heard on the trial of that case and embodied in the record. Counsel are wholly pardonable for the manifestations of joy over that

decision, for we confidently assert, that of all cases referred to in their brief, it is the only one which sustains their client on a statement of facts closely resembling those found by the court in this case. We frankly express our surprise with this one decision, and with the highest respect for the court which rendered it, we still respectfully suggest that the opinion does not state the law correctly. We have been unable to find either a single opinion of any other respectable court, or a text writer, going so far as that decision does, excusing the holder of trust funds from the liability which notice entails. .

We will briefly call the attention of the court to what we regard some of the untenable positions taken in said opinion. Speaking of the check or warrant on which that suit was brought, the court say: "It is in the usual form of a bank check, drawn upon the general fund of the drawer, without specifying any particular fund out of which it is payable, and differs from such check only in the fact, it has on the face of it some marginal memoranda and also some in the body of the check, to both of which reference will be made further on."

In answer to the foregoing we submit that there is very little of said check or warrant that is in the usual form of a bank check, and we deny that it purports to be "drawn on the general fund of the drawer." If it purports to be drawn on any fund whatever, it purports to be drawn on the fund liable to pay the debts of the case whose number is borne upon the face of the check, and of the estate, which is also named in the face of the check. The second error in the above extract consists in treating the particulars specified on the face of said check in accordance with the law and rule 28, as "marginal memoranda." Said rule requires that every check or warrant shall state the "debt, the sum and the account for which it is drawn, * * * and shall be

numbered in the case of each estate." And it will be observed that section 996, R. S. of the U. S., requires substantially the same things. "The account for which it is drawn" must mean the payee, the number and the amount of the dividend, and the estate out of which the dividend has been declared. All these, then, we insist, are matters of substance required by the law and Rule 28 in Bankruptcy, to be stated in the check, and none of them are in any proper sense "marginal memoranda." The form of the check adopted and used by the court and recognized by the bank in this case, shows the interpretation of the law and the rule, and it is beyond doubt a correct one, and counsel in their brief (p. 35) admit that these requirements of the rule are "*specific directions to the clerk or assignee, which are clearly applicable to the depository, and of which the latter is required to take notice.*" But the fatal error in the foregoing extract is found in the language which recognizes the moneys in the depository belonging to different bankrupt estates, as a "general fund of the drawer." Here we unqualifiedly deny that the bankrupt law recognizes any such monetary accumulations in the hands or control of any of the agencies of said law, and coming from different independent sources, like separate bankrupt estates, as a "general fund." Congress did not intend that estates of two or more separate bankrupts, having no common debts or liabilities, should be merged in a common or "general fund," in any sense. It did not intend that the funds arising from the estate of "A" should be used in the payment of the debts of "B." Each bankrupt surrenders his property for the payment of his own debts, and not for the payment of the debts of another. We further deny that the district court, in administering the bankrupt law, can make a common or "general fund" of the separate estates of individual bankrupts, so that the estate of either may, by the order of the

court, or by the negligent or willful act of its officers or agents, be used for the payment of the debts of the other. We doubt that Congress could have divested any man of his property by an act so unjust and so arbitrary, and it is certain that it was never intended that the bankrupt act should be so arbitrarily, clumsily or unjustly administered as to purposely or accidentally bring about such a result. Neither the District Court, nor any of its officers, could make this a "general fund," and the Supreme Court of the State of Illinois made a manifest mistake when it so treated i . The bankrupt law required every assignee to keep the funds of each estate wholly separate from funds of every other nature and kind, and while the same minute provisions are not repeated with respect to the clerk or the register, the spirit of the law and its proper administration, as exemplified in this case, require that the same care should be observed. Nor does the requirement of Section 995, R. S. of the U. S., militate against this idea by providing that "All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in said court, shall be forthwith deposited by the treasurer or assistant treasurer in a designated depository of the United States, in the name and to the credit of such court." This requirement is neither inconsistent with, nor does it restrict the power of either the officer of the court or the bank while entering the deposit in the name of and to the credit of the court, to keep the moneys belong to each estate separate and apart, so that the standing of each estate will be readily ascertained by the bank by reference to its own books.

After reciting the appointment of plaintiff in error as a depository, the manner in which the account was first kept, its change in form by order of the clerk, and the fact that the bank under-

stood that the numbers on either side of the account referred to the case in which the deposit was made and the check was drawn (Plaintiffs brief, p. 42 and 43.) The court say:

"The evidence shows, and indeed, the admission goes that far, that the bank always treated the account as an entirety, and paid out of it all checks drawn by the clerk and countersigned by the judge, until the deposits were exhausted."

Again the court falls into the error of recognizing the fact, that the bank treated the account as an entirety, as a material matter in determining its liability. The evidence in that case showed, and the record in this case conclusively shows, that the bank knew that the funds in its depository belonged to a particular case. This fact being established, we insist that it is wholly immaterial how the bank treated the account. Continuing the court say:

"This mode of keeping the account and making payments out of it seem to have been acquiesced in by the court and its principal officer, the clerk, under whose directions the deposits were made, for it is admitted that between the time of the first deposit in March 1873, and the death of Bowen in 1880, the bank balanced the account with the court nine different times, returning all checks to the clerk at each balancing and entering the case, number and amount of each check so returned in the depositor's book. That is the usual course when a depositor draws on his funds in bank as an entirety, and had this not been in conformity with the act of Congress and Rule 28 in Bankruptcy on the same subject, it is hardly probable the court would have permitted its account to be kept in that way, and payments to be made out of it as was done through so many years, without interposing some objections or requiring it to be kept otherwise. It does not appear any objection was ever made to that mode of treating the account, and it seems but reasonable to conclude it was satisfactory to the court."

All of which implies, that although it is evident from the finding of facts in this case, that the clerk improperly withdrew from the depository funds in payment of dividends to the creditors of estates, which estates had no funds in the deposi-

tory of the bank, of which the bank had notice; and although it appears that the clerk was derelict in his duty in not making a monthly report as required by law, and the court was equally negligent in not requiring such reports to be made, and in not supervising its account with the bank and ascertaining its exact condition, the court was negligent in countersigning checks drawn in estates in which no funds had been deposited in the bank; that, in short, it permitted this account to be managed by the clerk without the supervision which it was its duty to give, all of which matters were known to the bank; that if, notwithstanding all of these facts, this system of bookkeeping was satisfactory to the court and to the clerk, the bank was fully justified in paying the funds in its depository to parties who had no interest whatever in the funds on deposit there, all of which the bank knew from the entries on its books, even though by so paying out the funds, plaintiff in error has been unjustly deprived of the money which the law had dedicated to the payment of his debt, and which was deposited in the bank for that purpose, and could be lawfully used for no other. The court further say:

"The difficulty arises out of the admitted fact that the former clerk failed to deposit all the funds that came to his hands belonging to the registry of the court. Had he done so, there would, of course, have been enough in the bank with which to pay all the checks drawn upon the funds of the court."

In the case at bar there is no "admitted fact that the former clerk failed to deposit all the funds that came to his hands belonging to the registry of the court." Nor does the court find any such fact. Counsel for plaintiff in error argue at length upon that supposed state of facts, but no such fact is found in this record. Nor does it follow that even had the

clerk deposited all the funds which came into his hands belonging to the registry of the court there would have been funds there to pay the checks in controversy. For aught that appears in this record, money may have been paid out upon checks in estates from which no money ever came to the hands of the court, and it is not unfair to presume, if it be true that the clerk did withhold from the depository money which it was his duty to place there, and converted the same to his own use, that money for some improper purpose would have been withdrawn from the depository by the clerk, and on the theory of plaintiff in error it would have been obliged to honor any such check. Further the court say:

"It is proper, however, to bear constantly in mind, the depository or trustee in this instance is a banking corporation, and that the trust funds were placed in its custody for the purpose of being checked out by the depositor for the use of the beneficiaries entitled to the same. * * * Certainly a bank may properly make payments on checks of the person whose deposits it holds until notice of some adverse claim. Otherwise there would be no safety for a corporation transacting a banking business with its customers."

We find no objection to this statement of the law. It is true "that the trust funds were placed in its custody for the purpose of being checked out by the depositor for the use of the beneficiaries entitled to the same." And it is equally true that they were not to be checked out for any other purpose. Now when, as in this case, the bank from the entries which it continually carried on its books, and from the notice which every check contained knew that the funds were being checked out by the depositor for persons that were not "beneficiaries entitled to the same," the liability which notice of the character of the transaction entails, is fixed. The bank may properly make payments on checks of a person whose deposit it holds until notice

of some adverse claim, but we maintain that the bank had notice of the adverse claim of this defendant in error to the proceeds of the estates included in case No. 2105. When the funds belonging to that case were deposited, the number of the case accompanied the deposit ticket; that number was by the officers of the bank entered upon the deposit book of the clerk, and on the book of the bank itself, where it remained throughout this entire transaction, and the bank knew that it referred to a case of that number in the District Court, and that these funds were derived from that case.

The court further say:

"All the statute requires of the depository, is that it safely keep all trust funds intrusted to its custody by the court or its officers, and pay out the same on the checks or orders of the court, through its proper officers."

This is a correct statement of the liability of the depository if taken with the limitation which the law provides as to the manner of drawing checks. The check must bear the number of the case and show on what account the check is drawn. It cannot be contended that if a check failed to show these facts, the bank would be justified in paying it; nor can it be any more contended when a check shows these facts in such manner as to advise the bank of the fact that its payment is a misapplication of the funds in its depository, that it is in such case justified in its payment. Such payment is not the safe keeping of the funds intrusted to its custody for the beneficiaries thereof. It is a diversion of such funds from the beneficiaries entitled to them to other purposes, and it matters not whether those other purposes are the personal pecuniary benefit of the clerk, or to pay debts to other parties who have claims against other estates. The court then discuss at some length the purpose of the law and rule 28 in requiring

certain facts to appear on the face of the check or warrant, which facts it treats generally as "memoranda" for the benefit of the officers of the court; upon which it is only necessary to observe, that such memoranda or facts being required by the law are a necessary and substantial part of the check. Unless included in the check, the check is not such an one as the law recognizes, and would not be an order on the bank to pay out the funds in its depository. It seems to us, further, wholly immaterial for the purposes of this case what was the specific object of the law-making power in placing these requirements in the law. If as a matter of fact, and that fact is conclusively established in this case, those statements in the check gave notice to the bank that the payment of the check was a misappropriation of funds in its custody, which it held in trust for the beneficiaries of particular estates, then the bank is bound by such notice. Nor would it matter whether having such notice, it had entered memoranda to that effect on its books or not, as it did in this case, by entering the number of the case to which the deposit in every instance belonged. It is not, as we insist, a matter of how the bank kept its books or how the bank was disposed to treat this account, but to whom did these funds belong and did the bank have notice of their specific character?

In the closing part of the opinion, the court say:

"It is well known, and the testimony is full to that point, the practice among banks paying checks of their depositors is not to observe memoranda upon such checks, but the custom is to disregard them as having been made for the convenience of the drawers, and the practice in that regard, it is thought, has the sanction of the law in its support."

We maintain, as before, that what the court here treats as "memoranda" are substantial parts of these checks, made so by the law; that they impart notice of the purpose of the check-

The books of the bank showed whether or not any funds were on deposit applicable to the payment of such checks. What, then, has the custom of bankers to do with this question? As well might it have been proved that it was the custom of bankers not to pay their debts at all. Such proof would have had just as much force in this case in that event as the custom alluded to by the court. The liability of the depository is fixed by law, and not by the custom of bankers. The deposits intrusted to plaintiff in error were to be paid out to the beneficiaries thereof as designated, as recognized by the law, and not according to the custom of bankers. If it is the custom of bankers to disregard the known interests of those whose money they have in charge, then the sooner such custom is broken the better.

We insist, therefore, that the decision in the Reilly case, while made on a statement of facts not identical with those in this case, does not correctly state the law as applicable to the facts, even so far as they are identical in the two cases. Further, it involves the construction of a Federal statute, and such construction is not binding upon this court, any more than if the Reilly case were now pending on error in this court, and the decision of the court was here invoked in that case instead of this.

It is suggested by counsel for plaintiff in error that if the money deposited in the bank had been held for the payment of the creditors of the estate to which it belonged, the loss would have occurred just the same, only that it would have fallen upon different persons; that is, while the creditors of case No. 2105 would have been paid out of the funds belonging to such case, creditors of other estates whose money had not been properly cared for by the court, would have suffered. We are unable to see the force of that suggestion in this con-

nection. Whether or not creditors of other estates may or must lose the money which is due them, is something with which the court has nothing to do in considering this case. The money deposited to the credit of case No. 2105, belonged to the creditors of that estate and to them only. Having notice that it belonged to them, it was the duty of the bank to keep it for their benefit. Equally without force is the argument of counsel that to have kept separate accounts with the several estates in bankruptcy, would have been impracticable on account of its inconvenience. This can not be regarded for a moment as a defense for the bank. It has never been heard that it was a good defense for a trustee in seeking to relieve himself from his legal liabilities, to assert that it would have been inconvenient for him to keep his accounts in such a manner as to enable him to comply with the known duties of his trust. But is the suggestion made in defense true? Whether the accounts were kept under one general heading as was done in this case, or a separate account opened with each estate, the number of deposit entries and the number of checks paid in either case would have been exactly the same. It might have required more space on the books of the bank, but that is practically all the difference it would have made. As we maintain, placing the number of the case in the account with the entry of each deposit, was in effect keeping a separate account with each case. If the bank chose to keep these several accounts under one general heading and thereby a loss occurs which the bank might have averted by a different system of bookkeeping, the bank must be the loser. It can not by the plea of inconvenience shift the loss to the innocent creditor of an estate having funds in its depository.

It is argued at much length by counsel that the bank had the right to assume, as it did assume, that the memoranda on the face of the checks were for the convenience of the court and its officers. We have before discussed the character of the so-called memoranda. We insist that all the statements included in the check in accordance with the requirements of the law and rule 28 are matters of substance, and it was immaterial for what purpose they were placed upon the check. If they were placed there for the sole purpose of notice to the officers of the court and for their convenience, and yet the bank became cognizant of their import, they would bring notice to the bank and it would be chargeable with such notice. But did the bank treat the so-called memoranda as matters only for the convenience of the court and its officers? Plainly it did not. If these memoranda were alone for the convenience of the court, why did the bank transfer the essential part of such memoranda, viz.: the number of the case in every instance, from the deposit ticket to its own books and carry it continually on its books in connection with the deposits made in the several cases in bankruptcy. In short, it matters not for what purpose these matters were placed on the face of the check. If from them the bank had notice of the character of the deposit, and of the fact that the check was an attempt to use the money for a purpose other than that to which the law intended it, the bank is bound by such notice.

It is also intimated in the argument that in order to charge the bank, it must be shown that it had notice of an adverse claim. If by this it is insisted that it was the duty of defendant in error to notify the bank of his claim to a certain fund in its depository, then there is an irony in the argument more cruel than amusing.

The bankrupt law takes the estate of the bankrupt, by force if necessary, out of the reach of every creditor who might otherwise resort to such estate by legal process for the satisfaction of his debt. It places the proceeds of the estate in the keeping of the officers of the court, and the court of its own motion designates the bank in which the funds belonging to the estate shall be deposited. The creditor is all the while held at arm's length. He can not say in what bank the funds shall be deposited, and if the argument of counsel for plaintiff in error is correct, he has no right to demand that the funds belonging to the estate of which he is a creditor shall be used in the satisfaction of his claim. He must await the action of the court in allowing his claim, declaring the dividend and drawing and delivering the check to him. He is powerless to give notice of any kind to the bank or any one else until he presents his check at the counter of the bank for payment. In short, under the operation of the bankrupt law, the creditors of an estate had as much control over the custody of the funds belonging to that estate as they have over the national debt, and no more, and the suggestion that it was incumbent upon them to give notice of an adverse claim in order to charge the bank with responsibility for paying out funds which it knew from the face of the checks upon which such payments were made was a misapplication of such funds, is utterly and wholly idle. Defendant in error, who resides in the State of Massachusetts, and who was utterly powerless to influence the management of these trust funds in the custody of the court had the right to suppose that this trust fund would be faithfully managed by the court for the payment of his debt, and that everyone having charge of the funds belonging to the estate against which he had a legal claim would faithfully keep such funds for the purpose to which the law had dedicated them, and he has the

right to insist that any one who had either actual or constructive notice of the nature of the funds and of his claim thereon shall be held to a proper accountability.

The bank had knowledge from the numbers on the deposit tickets, which numbers it also transferred to and carried on its books, of the character of each deposit. It had the means of determining the amount deposited to the credit of each case, and upon the presentation of a check, of ascertaining if any funds were in the depository liable to the payment of such check. It knew the funds bore a trust character, and the number indicated the estate to the credit of which the deposit was made. It knew that money deposited in case No. 2105 belonged to the creditors of H. Sandford & Co., and it was its duty to keep such moneys for the payment of the creditors of those estates and no others. The funds belonging to each estate constituted in every instance a separate and distinct trust fund, devoted by law to the payment of the debts of such estate and to no other purpose. Each deposit was stamped with and bore a trust character, and of the nature of this trust the bank had not only constructive but actual notice. The creditors of any estate were the beneficiaries of the funds belonging to such estate.

If money belonging to case No. 2105 in the custody of the bank was by the officers of the bank paid to persons who are not creditors of any estate represented in said case and therefore not entitled to any of the funds deposited to the credit of such case, then the bank must make good to the creditors of such estates the amount which it wrongfully withholds from them. It can not be that it was the intention of the bankrupt law that in any case the creditor should be defrauded of his claim by the negligence or misconduct either of the officers of the court or any one to whom the funds liable to the payment

of his claim were intrusted for safe keeping. For in the finding of facts it is clear that if the bank had exercised such diligence as was its duty on the knowledge which it had of the nature of the funds in its depository and of the manner in which the clerk transacted the business of the court with the bank, no loss would have been occasioned to any creditor of any estate which had funds in its depository. Whatever loss, therefore, has been suffered, arises from its negligent act in thus failing to properly guard the funds which were placed in its keeping. Unless two wrongs can make one right, the improper act of the clerk in drawing the check upon the bank for payment of a claim on an estate which had no funds in the depository, can not be made valid by the endorsement of the court. But two wrongs never made one right nor can three. So the negligent or wrongful act of the bank added to the improper acts of the court and the clerk, can not legally deprive defendant in error of the money which is due him and which the bank unjustly withholds.

We insist therefore, that the fact that the bank understood when deposits were made that the numbers on either side of the account referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn did require the bank to keep the funds belonging to such case for the payment of checks drawn therein. Having received funds in case No. 2105 which it has not paid out on checks drawn in said case, it is liable for the payment of the checks in controversy, and the judgment of the Circuit Court should be affirmed.

GEO. HUNT,

For Defendant in Error.